

**Identifying the Value of Parliamentary Constitutional
Interpretation**

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Abstract

This thesis examines the practice of parliamentary constitutional interpretation. Parliamentary constitutional interpretation is a form of reasoning used by parliamentarians to articulate the constitutional effect of a Bill, within the legislative process in Parliament. The significance of the practice is explored through a combination of empirical study and theoretical enquiry.

The first part of the thesis describes and analyses parliamentary constitutional interpretation in three case studies, each on a different Government Bill from the 2010-2012 parliamentary session. Each study provides a fine-grained account of how parliamentarians interpreted the constitutional effect of each Bill and the role this interpretation played during the passage of the Bill. In order to identify the constitutional effect of a particular clause, parliamentarians interpret a range of constitutional norms including: constitutional principles, constitutional statutes and constitutional conventions. In each case study, parliamentary constitutional interpretation played an important role in shaping the constitutional effect of each Bill and holding the Government to account.

The second part of the thesis uses the reality of the practice, as described in the case studies, to identify the value of parliamentary constitutional interpretation and to situate the practice within political constitutionalism. Two principal values of the practice are identified. Firstly, parliamentary constitutional interpretation can enhance the level of justification within the legislative process. Secondly, it can facilitate a distinctively parliamentary contribution to the normative content of the constitution. By expanding the role of legislative politics within the constitution, parliamentary constitutional interpretation can develop and strengthen the political model of constitutionalism. These values also serve as both a template for analysis of parliamentary performance and as a guide to parliamentary reform.

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1. Introduction

The aim of this thesis is to identify the value of parliamentary constitutional interpretation in the United Kingdom. This aim translates into two principal research questions. Firstly, how do parliamentarians interpret the constitutional effect of Bills within the legislative process? Secondly, what is the value of this form of legislative reasoning? Constitutional interpretation is not a form of reasoning associated with either the United Kingdom's constitution or Parliament. This thesis argues that constitutional interpretation currently plays a significant role in the law making process within Parliament, and has the potential to strengthen both the legislative process and the constitution.

Parliament regularly considers pressing and complex constitutional questions as a result of the steady flow of Government Bills that have constitutional effect.¹ A central premise of this thesis is that in order to determine and scrutinise the constitutional effect of a Bill, parliamentarians and parliamentary committees engage in constitutional interpretation. Parliamentary constitutional interpretation arises in two principal scenarios. Firstly, a Bill can contain a clause that is considered to have a constitutional effect in the sense that it raises a point of constitutional principle, for

¹ The House of Lords of Select Committee on the Constitution uses slightly different terminology. The terms of reference state the committee is 'to examine the constitutional *implications* of all public Bills coming before the House'; House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001-02, 11) para 1.

example: a broad Henry VIII power.² Secondly, a Bill can contain what is considered to be a new constitutional norm, for example: five-year fixed parliamentary terms.³ In both scenarios, the legislative process presents an opportunity for parliamentarians and parliamentary committees to interpret constitutional norms. The first object of interpretation in both scenarios is the relevant clause, but in order to determine the constitutional effect of the clause in question, the interpreter will also have to interpret existing constitutional norms. Both of these interpretive practices make up the subject of this thesis.

The thesis aims to develop awareness of the role of constitutional interpretation within the legislative process within Parliament. The Westminster model is widely regarded as resulting in executive domination of the legislature, but the emphasis on this aspect of the model can produce an over-simplified picture of legislative politics within Parliament.⁴ Parliament is rightly regarded as a ‘law-affecting’, rather than a ‘law-making’ body.⁵ Parliamentary debate is not where the policy aims behind Acts of Parliament are decided. However, the institutional and political constraints upon Parliament do not prevent parliamentary scrutiny playing a significant role within the legislative process. In *Parliamentary Scrutiny of Government Bills* Griffith observed:

² See Chapter 3.

³ See Chapter 5.

⁴ Lord Hailsham, *The Dilemma of Democracy* (Collins 1978) 9-11; See also A Lijphart, *Patterns of Democracy* (Yale University Press 1999).

⁵ P Norton, *Parliament in British Politics* (Palgrave Macmillan 2005) 3.

That Parliament makes an impact on the legislative proposals of Governments is undeniable. That Governments, with their majorities, will at the end of the day almost always have much the greater part of what they want is common knowledge. But the language which is used to describe the more or less of the impact is imprecise.⁶

Part of the problem is that scholars of law and politics have been slow to develop the language that can identify what parliamentarians should be doing in the legislative process.⁷ This thesis seeks to respond to this gap in the literature by identifying the qualities that make a particular form of legislative reasoning valuable to the legislative process. This analysis can form the basis of understanding and evaluating the performance of parliamentarians within the legislative process.

This thesis is based on empirical analysis of parliamentary constitutional interpretation. The basic aim of the empirical part of the project is to develop a fine-grained account of how parliamentarians and parliamentary committees use constitutional interpretation within the legislative process. A motivating factor behind this inquiry was the sense that Parliament, and the House of Lords in particular, is becoming increasingly effective at constitutional interpretation, and so the analysis was limited to the first parliamentary session after the 2010 general election, the long session of 2010-2012, so as to provide a relatively recent account of this developing

⁶ JAG Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin 1974) 13.

⁷ J Waldron, *Law and Disagreement* (OUP 1999) 9-10.

practice. The empirical part of the project aims to identify and then to analyse examples of the practice. The empirical analysis uses three case studies of Government Bills, chapters three, four and five, each of which was deemed to have ‘constitutional implications’ by the House of Lords Select Committee on the Constitution, and contained a number of examples of constitutional interpretation at multiple stages during their passage through Parliament.⁸ Each case study addresses the following questions: what were the main examples of constitutional interpretation? How were the relevant clauses and constitutional norms interpreted? What contribution did constitutional interpretation make to the passage of the Bill and to the constitution? The methods used in the case studies to address these questions are set out in chapter two.

To narrow the focus, the interpretation of human rights is excluded from the empirical analysis. The role of human rights in Parliament has been subject to extensive analysis in the literature, including a number of recent empirical projects.⁹ Further, the significance of the role of constitutional norms, other than rights, within the parliamentary legislative process has arguably not received the attention it deserves.¹⁰ The norms that structure the constitutional system in the United Kingdom are clearly relevant to analysing the content of Government Bills, but precisely how such

⁸ House of Lords Select Committee on the Constitution (n 1).

⁹ M Hunt, H Hooper and P Yowell, *Parliaments and Human Rights* (AHRC 2012); J King, ‘Parliament’s Role Following s 4 Declarations of Incompatibility’ in M Hunt, H Hooper and P Yowell (eds), *Parliaments and Human Rights* (Hart 2015); A Sathanapally, *Beyond Disagreement* (OUP 2012).

¹⁰ W Waluchow, ‘Constitutional Rights and Democracy: a Reply to Professor Bellamy’ (2014) 14 *German Law Journal* 1039, 1043.

constitutional norms are used has not yet been identified. This thesis argues that constitutional interpretation is the activity responsible for articulating the substance of the norms that underpin the UK's constitutional architecture within Parliament. One of the advantages of the focus on these norms is that it shifts attention away from the relationship between Parliament and the courts, which is such a prominent feature in literature on human and constitutional rights in Parliament. Instead this thesis analyses Parliament's constitutional interpretation on its own terms, and does not consider the implications of the practice for the role of courts in the UK. It should be noted that the literature on the role of constitutional rights within Parliament is used to inform the analysis of the value of constitutional interpretation.

The second part of the project, chapters six, seven and eight, uses the empirical account of the case studies to build a normative analysis of the contribution of parliamentary constitutional interpretation within the parliamentary legislative process. There is a strong tradition within public law of building constitutional analysis on detailed accounts of 'the mundane, every day practices of constitutional actors'.¹¹ How can parliamentarians use the interpretation of the substance of the constitution to enhance both the process and the constitution itself? This question is answered by using the insight from the case studies to engage with relevant literature on the legislative process, constitutional law and constitutionalism. This search for the value of parliamentary constitutional interpretation is not

¹¹ G Webber, 'Parliament and the Management of Conflict' [2014] Public Law 101, 104.

intended simply to praise the work of parliamentarians. Instead the aim is produce a realistic account of the potential value of the practice so as to provide a basis for the critical evaluation of the parliamentary performance of constitutional interpretation. Without a sense of why the practice is valuable or what makes it work well, it is difficult to build the case for the practice's role to be strengthened and developed.

1.1 A mini case study: the Parliamentary Standards Bill

To illustrate the form of legislative reasoning that is the subject matter of this thesis, this mini case study provides a snapshot of how parliamentary constitutional interpretation influenced the debate on a clause within the Parliamentary Standards Bill.¹² In the summer of 2009, Parliament was rocked by the expenses scandal. In response, on 23 June the Government introduced the Parliamentary Standards Bill to the House of Commons.¹³ Despite being a measure of constitutional reform, the Bill was fast-tracked through Parliament.¹⁴ The Bill was deemed to be of 'first-class constitutional significance' and as a result received its Committee stage on the floor of the House of Commons.¹⁵ Both of these procedural features proved significant. The substance of the Bill sought to end the self-regulation of MPs expenses, and this represented a departure from the long-

¹² For a fuller account see N Parpworth, 'The Parliamentary Standards Act 2009: A Constitutional Dangerous Dogs Measure?' (2010) 73 *Modern Law Review* 262; R Kelly and M Hamlyn, 'The Law and Conduct of MPs' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013) 108-109.

¹³ Parliamentary Standards HC Bill (2008-09) [121].

¹⁴ See House of Lords Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-09, 116).

¹⁵ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 566.

established constitutional status quo of parliamentary self-regulation. As Jack Straw MP (Labour), Lord Chancellor and the Secretary of State for Justice, put it ‘the painful lesson of the past six weeks is that our prescription for others must now be applied to ourselves’.¹⁶ The Bill sparked major constitutional debates in both Houses of Parliament, and the interpretation of parliamentary privilege and Article 9 of the Bill of Rights 1689 figured prominently within those debates.

Clause 10 of the Bill as introduced stated:

No enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent—

- (a) the IPSA from carrying out any of its functions;
- (b) the Commissioner from carrying out any of the Commissioner’s functions;
- (c) any evidence from being admissible in proceedings against a member of the House of Commons for an offence under section 9.¹⁷

The clause was designed to ensure that evidence against an MP under the new standards regime created by the Bill would be admissible in court, and that an MP could not rely on the protection provided by parliamentary privilege and Article 9 of the Bill of Rights 1689 in such a situation.¹⁸

Article 9 and parliamentary privilege are central to the regulation of the

¹⁶ Jack Straw MP (Labour) Lord Chancellor and Secretary of State for Justice, HC Deb 29 June 2009, vol 495, col 45.

¹⁷ Parliamentary Standards HC Bill (2008-09) [121] cl 10.

¹⁸ Explanatory Notes Parliamentary Standards HC Bill (2008-09) 121-EN.

relationship between Parliament and the courts,¹⁹ so a formal legislative change to the remit of these constitutional norms is potentially of major constitutional significance.

On 1 July the Commons' Justice Committee published a report on the Bill.²⁰ Sir Malcolm Jack, Clerk of the House of Commons, gave both written and oral evidence to the Committee.²¹ In his evidence, Jack warned that clause 10 was a 'wide qualification of Article 9':²²

It would mean that the words of Members generally, the evidence given by witnesses (including non-Members) before committees and advice given by House officials on questions, amendments and other House business could be admitted as evidence in criminal proceedings. This could have a chilling effect on the freedom of speech of Members and of witnesses before committees and would hamper the ability of House officials to give advice to Members.²³

This stark warning was noted by a number of MPs during the second reading debate. Bernard Jenkin MP (Conservative) echoed Jack's warning on the effect of the freedom of speech in the House.²⁴ In response, the Government indicated that it was willing in principle to amend the clause to

¹⁹ See L Lawrence Smyth, 'Privilege, Exclusive Cognisance and the Law' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013).

²⁰ Justice Committee, *Constitutional Reform and Renewal: Parliamentary Standards Bill* (HC 2008-09, 791).

²¹ Justice Committee (n 20).

²² Justice Committee (n 20) Ev 2.

²³ Justice Committee (n 20) Ev 12.

²⁴ HC Deb 29 June 2009, vol 495, col 55.

limit the extent of the conflict with Article 9.²⁵ Two days later, on the second day of the committee stage, the debate did not reach clause 10 because a programme motion limited the debate, but even before clause 10 was reached, a number of MPs made reference to the Clerk's warnings on the impact of the clause on privilege.²⁶ When the clause was put to a vote, it was defeated by 250 to 247.²⁷

That the programming of the Bill resulted in clause 10 not being debated highlights a key problem with the Government's control of the timetable in the House of Commons. A failure to deliberate on a provision with such a significant constitutional effect departs from almost any form of constitutionalism. However, as the Bill was caught by the convention on Bills of 'first class constitutional importance', it was heard on the floor of House, where the chances of defeating the Government were markedly higher than in a public bill committee.²⁸ So in this case, the absence of debate did not inhibit the effectiveness of parliamentary scrutiny. MPs were able to communicate their dissatisfaction with the constitutional effect of the clause and their support for the Clerk's analysis in the report of the House of Commons' Justice Committee by defeating the Government in a vote. In response to the defeat, Jack Straw MP, speaking for the Government, said that the defeat would not be reversed in the Lords: 'we will respect the

²⁵ HC Deb 29 June 2009, vol 495, col 129.

²⁶ HC Deb 1 July 2009, vol 495, cols 340-362.

²⁷ HC Deb 1 July 2009, vol 495, cols 382-383.

²⁸ On the limited impact of Public Bill Committees see: L Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' (2012) 66 Parliamentary Affairs 459.

decision’.²⁹ This was confirmed when in the Lords the Government accepted an amendment from Lord Strathclyde (Conservative), leader of the opposition in the Lords, which stated that ‘nothing in this Act shall be construed by any court in the United Kingdom as affecting Article IX of the Bill of Rights 1689’.³⁰ These words became s1 of the 2009 Act.³¹ Within this particular episode, the active ingredient in the parliamentary analysis of clause 10 was the interpretation of the constitutional effect of the clause, which relied upon the interpretation of Article 9 of the Bill of Rights 1689. The idea that the qualification was exceedingly broad underpinned a range of parliamentary action, namely a committee report, the dialogue between parliamentarians and the Government at second reading and in the committee stage, and ultimately a vote. It would be wrong to claim that constitutional interpretation necessarily caused the defeat, or that every parliamentarian who voted against the clause was necessarily motivated by Jack’s analysis in the Justice Committee report. But at the same time it is reasonable to say that Parliament’s engagement with this particular clause was shaped by how parliamentarians interpreted the constitutional effect of the clause and their interpretation of the relevant constitutional norms. This thesis examines the role of this practice within the parliamentary legislative process, to work out what factors influence its character and to develop an account of why it matters.

²⁹ HC Deb 1 July 2009, vol 495, col 387.

³⁰ HL Deb 15 July 2009, vol 712, col 1049.

³¹ Parliamentary Standards Act 2009 s 1.

One important lesson from this mini-case study is that outside of the rights context, parliamentarians are adept at interpreting those constitutional norms that are central to their own constitutional role. This can be seen in a cynical sense, that parliamentarians simply defend their own powers and interests. But in terms of the balance of power between Government and Parliament within the legislative process, parliamentarians' ability to interpret the norms that underpin the existing constitutional settlement, particularly in relation to those norms that underpin the democratic law-making procedure, is extremely valuable. As Davis explains, in an important article on the parliamentary passage of the Legislative and Regulatory Reform Act 2006, the law-making procedures within Parliament represents an opportunity for parliamentarians to limit the Government's ability to depart from existing constitutional principles.³² Through the ability to table amendments, and to challenge the Government on the detail, parliamentary procedure does allow parliamentarians to transmit their own constitutional interpretation into parliamentary scrutiny of Government Bills. In this context, it is a strength of the parliamentary system that parliamentarians can use their loyalty to the parliamentary process to shape their interpretation of Government Bills and to hold the Government to account via legislative scrutiny.

Although Davis is right to emphasise the role of procedure in providing a platform for this constitutional dynamic, this thesis argues that the active

³² P Davis, 'The Significance of Parliamentary Procedures in Control of the Executive: a Case Study: the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006' [2007] Public Law 677, 678.

ingredient in the process is the ability to articulate the constitutional effect of a Bill and to interpret constitutional norms, especially those that are central to Parliament's constitutional role. This mini-case study shows that a factor within parliamentary constitutional interpretation is the parliamentarians' own awareness of the norms that underpin their role within the constitution. There is a coincidence of interests between the substance of the norms that relate to Parliament's constitutional role and the activity for which they are interpreted: the scrutiny of Government Bills. This is part of what makes focusing on the parliamentary interpretation of constitutional norms outside of the rights context so important. Parliament depends on parliamentarians' desire and ability to articulate the legislative implications of the principles that regulate its functions.³³ Without it, Parliament's role within the constitution could be marginalised.

1.2 Parliament and the UK constitution

Parliamentary constitutional interpretation is defined by the relationship between Parliament and the constitution. One of the features of that relationship is that both elements have changed significantly over the past 50 years. According to Nicol, prior to the European Communities Act 1972 (EC Act) parliamentarians operated within an 'autonomous political sphere'.³⁴ The idea of an 'autonomous political sphere' is important to understanding the changing nature of the relationship between Parliament and the constitution, as well as the division between law and politics in the

³³ C Pinelli, 'Constitutional Reasoning and Political Deliberation' (2013) 14 *German Law Journal* 1171, 1173.

³⁴ D Nicol, *EC Membership and the Judicialisation of British Politics* (OUP 2001) 254.

United Kingdom. The autonomous political sphere can be related to Griffith's vision of the UK constitution as a 'political constitution', put forward in 1979, where 'everything that happens is constitutional'.³⁵ Within the 'political constitution', the autonomy of the political sphere was the product of a constitution which had parliamentary sovereignty as its first principle, and which was 'indeterminate, indistinct and unentrenched'.³⁶ Within the 'autonomous political sphere', the absence of a codified constitutional framework meant that law and constitutional norms did not play a significant role in shaping the substance of parliamentary politics. Membership of the European Union and the challenge to parliamentary sovereignty marked for Nicol the beginning of fundamental change to the approach of parliamentarians to law in general, and to constitutional law in particular.³⁷

A number of important changes to the normative content of the constitution have occurred since 1997. The enactment of the Human Rights Act 1998 (HRA), the devolution statutes, the Constitutional Reform Act 2005 and the Fixed-Term Parliaments Act 2011 (subject to detailed analysis in Chapter 5) have all contributed to a major change in the relationship between Parliament and constitution. The UK constitution has always been shaped by Acts of Parliament, for example the Bill of Rights 1689, the Septennial Act 1716, the Parliament Acts 1911 and 1949, and the European

³⁵ JAG Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1, 19.

³⁶ S E Finer, V Bogdanor and B Rudden, *Comparing Constitutions* (OUP 1995) 40.

³⁷ Nicol (n 34) 260.

Communities Act 1972. However, there is a sense that the combined effect of recent changes has radically changed the constitution and Parliament's role within it. For Bogdanor, it is now a 'new constitution' defined by the HRA, where the separation of powers rather than parliamentary sovereignty is the predominant principle.³⁸ Power has shifted from Parliament to the courts, to devolved assemblies, and to Europe. As a result the norms that divide responsibility, distribute power and constrain the Government figure more prominently in parliamentary politics within the legislative process.

British constitutional lawyers disagree on the level of engagement of parliamentarians with constitutional norms. For Nicol, as a result of these changes parliamentarians are now more adept at engaging with constitutional law issues than ever before.³⁹ Nicol's analysis is concerned with whether parliamentarians are aware of the constitutional implications of the Bill before them, and in particular whether a Bill is transferring power to the judiciary. This partly explains his positive verdict. By contrast, those who focus on parliamentarians' ability to use constitutional norms as tools for scrutiny and justification remain sceptical that 'political autonomy' has been abandoned. According to Murray Hunt, the second adviser to the Joint Committee on Human Rights, parliamentary sovereignty influences political attitudes towards the significance of constitutional norms within the legislative process:

The idea that Parliament can make any law but is subject to none is a truly powerful one, which continues to shape a surprising amount of

³⁸ V Bogdanor, *The New British Constitution* (Hart 2009) 285.

³⁹ Nicol (n 34) 260.

what goes on in Parliament. It pervades the language, the customs and, most importantly, it sub-consciously defines the ways in which some of the principal actors perceive of their roles. If Parliament can make any law, and courts must give effect to that law come what may, why should parliamentarians or, for that matter, Government lawyers, bother thinking about how a new statute fits with other laws?⁴⁰

Oliver also strikes a pessimistic tone, when she observes that in comparison with a number of other constitutional democracies, in the UK there is ‘a worrying lack of appreciation on the part of ministers and some parliamentarians of the existence and importance of legal and constitutional values’.⁴¹ Constitutional reform has changed the conditions upon which parliamentarians’ autonomy was based; however, this has not necessarily resulted in a change of attitude throughout Parliament. Hunt and Oliver’s critical view of the approach of certain parliamentarians to constitutional norms is in part informed by the contrast with those within Parliament, particular in the Lords, who are now regularly using constitutional norms to inform their analysis of Government Bills.

The House of Lords has become more important than the House of Commons in providing effective constitutional scrutiny and constitutional interpretation. The ability to perform this role changed radically in 1999. The House of Lords Reform Act 1999 removed the bulk of the hereditary

⁴⁰ M Hunt, ‘The Joint Committee on Human Rights’ in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013) 248.

⁴¹ D Oliver, ‘Improving the Scrutiny of Bills: The Case for Standards and Checklists’ [2006] Public Law 219, 226.

peers from the Lords, and the resulting change to the composition of the House has made its scrutiny more effective.⁴² Since 1999, the House of Lords has become more assertive in the legislative process, which is apparent from the data on the number of government defeats in the Lords and the number of times that the Lords has insisted on its amendments.⁴³ For example between 1979 and 1997 the House of Lords insisted on its amendments 3 times, while between 1997 and 2013 it has insisted on its amendments 43 times.⁴⁴ While Parliament or the House of Lords do not block Government Bills, the Lords' scrutiny now regularly results in major changes to the content of the Government's legislation.⁴⁵

Russell notes that the Lords is particularly influential when it is in 'constitutional propriety mode'.⁴⁶ The first decade of the 21st century saw a number of examples of the House of Lords' prominent role in the scrutiny of Government Bills with constitutional effect. In the 2002-2003 session, during the consideration of the Criminal Justice Bill, the Lords twice defeated the Labour government on a proposal to restrict trial by jury.⁴⁷ In March 2004 during a debate on the Constitutional Reform Bill the Government was defeated in the Lords on a procedural motion to commit

⁴² M Russell, 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons for Bicameralism' (2010) 58 *Political Studies* 866.

⁴³ M Russell, *The Contemporary House of Lords* (OUP 2013) 138-139.

⁴⁴ Russell (n 43) 139.

⁴⁵ Russell (n 43) 149.

⁴⁶ Russell (n 43) 187.

⁴⁷ Russell (n 43) 154.

the Bill to a special ad hoc select committee.⁴⁸ The resulting select committee on the Bill took evidence and made a number of significant changes to the Bill. These changes included the introduction of provisions to safeguard the rule of law and judicial independence.⁴⁹ In that same session, during the debate on the Prevention of Terrorism Bill, which contained a number of measures that were considered to be constitutionally unacceptable, the Lords defeated the Government a record eighteen times.⁵⁰

The following statement by a Government official, made as part of a study of the Health and Social Care Act 2012 (covered in Chapter 4) by the Institute for Government, gives an indication of the role of the House of Lords post-1999:

Ninety per cent of our effort went into planning and managing the Lords. It is what all government departments do, because it is only really in the Lords that the ultimate shape of any Bill gets determined. Will the Government achieve its policy objectives given the different nature of the debate there, the quality of debate, and the mathematics?⁵¹

⁴⁸ A Le Sueur, 'From Appellate Committee to Supreme Court: a Narrative', in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP 2009).

⁴⁹ Ibid.

⁵⁰ Russell (n 43) 155.

⁵¹ N Timmins, *Never Again? The Story of the Health and Social Care Act 2012* (Institute for Government and The King's Fund 2012) 95.

As Russell observes, the House of Lords' role in the legislative process challenges the assumption that parliamentary scrutiny is ineffective and that bicameralism in Parliament is weak.⁵²

In the legislative process, it is always important to maintain a dose of realism, and even with the Lords' resurgence, Daniel Greenberg, a former parliamentary counsel, comments that:

The reality is that almost all provisions of almost all Acts of Parliament are constructed entirely by Government officials and taken through without any real involvement at a technical level of anybody outside the Government machine.⁵³

Furthermore, recent studies have indicated that despite the reform of the committee stage in the Commons,⁵⁴ legislative scrutiny remains weak within the primary and directly elected chamber.⁵⁵ It is important though not to equate effective scrutiny with the number of concessions secured or Government defeats, as the reality of the legislative process is more complicated than such a simple equation would indicate.⁵⁶ The influence of legislative scrutiny extends beyond the parliamentary process to the internal Government machine. The existence of the *Cabinet Guide to Legislation*, which contains guidance on preparing a Bill for the Parliament, evidences

⁵² Russell (n 43) 290-300.

⁵³ D Greenberg, *Laying Down the Law* (Sweet and Maxwell 2011) 120.

⁵⁴ J Levy, 'Public Bill Committees: An Assessment Scrutiny Sought; Scrutiny Gained' (2010) 63 *Parliamentary Affairs* 534.

⁵⁵ Thompson (n 28).

⁵⁶ P Cowley, *The Rebels: How Blair Misled his Majority* (Politico's 2005) 91; M Russell, 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons for Bicameralism' (2010) 58 *Political Studies* 866, 867.

this point. The Government adjusts its proposals in anticipation of the reaction within Parliament.⁵⁷ The problem is that Parliament's influence within Government is difficult to detect.

The other major change to Parliament's capacity to engage in constitutional interpretation has been the creation of a number of parliamentary committees dedicated to scrutinising Government Bills for compliance with constitutional norms. The most important committee for this thesis is the House of Lords Select Committee on the Constitution (hereafter Constitution Committee). The Committee was established following a recommendation of the Royal Commission on the House of Lords that the House of Lords 'should establish an authoritative Constitution Committee to act as a focus for its interest in and concern for constitutional matters'.⁵⁸ It was given the following terms of reference 'to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution'.⁵⁹ It began work in 2001. After a slow start, the Constitution Committee has established itself as important part of the legislative process.⁶⁰

⁵⁷ M Russell, M Benton, D Gover and K Wollter, 'A Parliament that Bows and Scrapes: The Westminster Parliament's impact on government legislation 2005-2010' (Political Studies Association Conference, Dublin 2012) 2.

⁵⁸ Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.22.

⁵⁹ House of Lords Select Committee on the Constitution (n 1) para 11.

⁶⁰ J Simson Caird, 'Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution' [2012] Public Law 7; A Le Sueur and J Simson Caird, 'The House of Lords Select Committee on the Constitution' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013).

The Delegated Powers and Regulatory Reform Committee (hereafter DPRRC) was established in 1992 on the recommendation of the Jellicoe Committee.⁶¹ Its terms of reference are ‘to report whether the provisions of any Bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny’.⁶² Robert Hazell indicates that the main role of the committee is ‘to police the boundary between primary and secondary legislation’.⁶³ The work of the committee has made an impact on the way legislation is prepared in Government. The *Cabinet Guide to Making Legislation* contains an entire chapter dedicated to the work of the Committee.⁶⁴

The Joint Committee on Human Rights (hereafter JCHR) was established in 2001.⁶⁵ The JCHR scrutinises Government Bills for ‘compatibility with human rights, including common law fundamental rights and liberties, the Convention Rights protected by the Human Rights Act 1998 and the human rights contained in other international obligations assumed by the UK’.⁶⁶ Section 19 of the Human Rights Act 1998 requires that every Government

⁶¹ Select Committee on the Committee Work of the House (“the Jellicoe Committee”), *Report*, (HL 1991-92 35) para 133.

⁶² *Ibid.*

⁶³ R Hazell, ‘Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive’ [2004] Public Law 495, 496.

⁶⁴ Hazell (n 63) 495; Cabinet Office, *The Guide to Making Legislation* (2013) 144.

⁶⁵ For accounts of the working practices of the committee see: AP Lester and P Uccellaru, ‘Parliamentary Scrutiny of Human Rights’ in AP Lester, D Pannick and JW Herberg (eds), *Human Rights Law and Practice* (Lexis Nexis 2009); M Hunt, ‘The Impact of Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?’ (2010) *European Human Rights Law Review* 601.

⁶⁶ Joint Committee on Human Rights, *The Committee’s Future Working Practices* (2005-06 HC-1575 HL 239).

Bill is accompanied by a ministerial statement on the compatibility of the Bill with rights protected by the European Convention on Human Rights.⁶⁷ The JCHR has transformed the level of deliberation on human rights within Parliament, and of the three committees referred to, it has received by far the most analysis within constitutional law scholarship in the UK, which is another reason why this thesis focuses on constitutional interpretation outside of the rights context.⁶⁸

Together these committees lead Tomkins, currently a legal adviser to the Constitution Committee, to argue that parliamentarians ‘take the constitution seriously and that they take their onerous constitutional responsibilities seriously’.⁶⁹ Hazell observes that these committees have externalised the protection of constitutional norms.⁷⁰ Prior to the establishment of these committees, the protection of these values was internalised within the executive and in the work of the Parliamentary Counsel. This important point highlights one of the key values of parliamentary constitutional interpretation, that it facilitates open public

⁶⁷ See E Weston, ‘Section 19 of the Human Rights 1998: Importance, Impact and Reform’ (PhD Thesis, Kings College London 2013).

⁶⁸ J Hiebert, ‘Governing under the Human Rights Act: The Limitations of Wishful Thinking,’ [2012] Public Law 29; ‘Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?’ (2006) 4 International Journal of Constitutional Law 1; ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 29 Modern Law Review 7; ‘New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?’ (2004) 82 Texas Law Review 1963; ‘Interpreting a Bill of Rights: The Importance of Legislative Rights Review’ (2004) 35 British Journal of Political Science 235; see also n 9 and n 65 above.

⁶⁹ A Tomkins, ‘What’s Left of the Political Constitution?’ (2013) 14 German Law Journal 2276, 2278.

⁷⁰ Hazell (n 63) 499-500.

debate on the role of constitutional norms within Government Bills.⁷¹ When we know that in the past, as Nicol has shown, Parliament has been ill-served by the information provided by the Government lawyers in relation to the constitutional implications of Government Bills, the presence of actors in the legislative process designed to transmit constitutional analysis of Bills whose loyalty is to Parliament, rather than to the Government, is a major step forward.⁷²

These committees have created a mechanism by which the constitutional effect of legislation can be identified, debated and scrutinised. However, as a mechanism for the protection of constitutional norms, or for creating a safeguard or a level of deliberation for measures of constitutional change, one should not lose sight of the broader perspective. The Lords only holds a one-year delaying power and rightly recognises its inferior democratic credentials in its negotiations with the Commons. The Government can still use its majority in the Commons, together with its control of the timetable, to minimise the scope for effective analysis of significant constitutional measures. As Oliver observes, the existing arrangements provide ‘a fragile protection against the passage of unconstitutional laws’.⁷³ Parliamentary constitutional interpretation lacks the support of a formal procedure of constitutional amendment, or a codified set of constitutional norms, or the threat of judicial enforcement (outside of the HRA 1998 and EU Law

⁷¹ D Feldman, ‘Parliamentary scrutiny of legislation and human rights’ [2002] Public Law 323, 332

⁷² Nicol (n 34) 257.

⁷³ D Oliver, ‘Constitutional Scrutiny of Government Bill’ (2004) 4 Macquarie Law Journal 33, 52.

context). In that context it is quite remarkable that constitutional interpretation has carved out even this rather fragile position within Parliament.

1.3 Why should Parliament interpret constitutional norms?

The notion that constitutional interpretation should be a routine part of the way in which parliamentarians analyse Government Bills is not prominent in the UK constitutional law literature. In part this is because for some the Westminster system of parliamentary government is not the ‘natural partner’ of constitutionalism’.⁷⁴ More importantly, constitutional interpretation is associated with the interpretation of the text of a codified constitution, no more and no less. To the extent that it is relevant to UK constitutional law, constitutional interpretation is regarded as a task for the courts rather than parliamentarians. This thesis challenges these assumptions, and draws on a range of literature to construct an account of the UK parliamentary legislative process in which constitutional interpretation plays a vital role.

The approach taken is in part inspired by the rich literature in the United States on congressional constitutional interpretation.⁷⁵ In a classic article

⁷⁴ K Ziegler, D Baranger and A Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart 2007) 3.

⁷⁵ B Peabody, ‘Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes 1959-2001’ (2004) 29 *Law and Social Inquiry* 127; J Fleming, ‘Judicial Review without judicial supremacy: taking the constitution seriously outside of the courts’ (2004-2005) 73 *Fordham Law Review* 1377; P Brest, ‘The Conscientious Legislator’s Guide to Constitutional Interpretation’ (1974-1975) 27 *Stanford Law Review* 585; J Pickerill, *Constitutional Deliberation in Congress*

published in 1893, Thayer argued that US judges should defer heavily to legislative interpretations of the Constitution.⁷⁶ Thayer also recognised that features of the legislature would influence the nature of the interpretation, so that the courts and the legislature would develop their own complementary approaches to constitutional interpretation.⁷⁷ Thayer's analysis has prompted a number of responses in US scholarship.⁷⁸ One of the important features of this work is to emphasise the distinctive features of the legislative approach to constitutional interpretation, and one of the goals of this thesis is to identify the implications of the parliamentary context for the practice.⁷⁹ Another important input into the US debate came in the Supreme Court decision of *City of Boerne v Flores*.⁸⁰ The majority implored that Congress 'has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution'.⁸¹ In 2001, Katyal's article on 'legislative constitutional interpretation' set out the key features of

(Duke 2004); S Burgess, *Contest for Constitutional Authority* (Kansas 1992); K Whittington, 'Extrajudicial constitutional interpretation: Three objections and responses' (2001-2002) 80 North Carolina Law Review 773; N Devins and K Whittington, (eds) *Congress and the Constitution* (Duke 2005); C Tiefer, 'Comparing alternative approaches about Congress's role in constitutional law' (2000) 34 University of Richmond Law Review 489.

⁷⁶ J Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 Harvard Law Review 129, 156.

⁷⁷ C Sunstein and A Vermeule, 'Interpretation and Institutions' (2003) 101 Michigan Law Review 885.

⁷⁸ E Garrett and A Vermeule, 'Institutional Design of a Thayerian Congress' (2001) 50 Duke Law Journal 1278.

⁷⁹ Garrett and Vermeule (n 78); C Eisgruber, 'The Most Competent Branches: A Response to Professor Paulsen' (1994) 83 Georgetown Law Journal 347, 355; D Johnsen, 'Functional Departmentalism and Non-Judicial Interpretation: Who Determines Constitutional Meaning?' (2004) 67 Law and Contemporary Problems 105, 112.

⁸⁰ 521 US 507 (1997).

⁸¹ *City of Boerne v Flores* 521 US 507 (1997) 835.

the practice.⁸² Katyal emphasises that legislative constitutional interpretation can serve to reconcile what previously have been considered incompatible goals, ‘a living Constitution and a democratic government’.⁸³ If the meaning of the constitution can be updated via the democratic process, then concerns that the content of the constitution is only determined by unaccountable judges or by the dead hand of the past would be minimised. Within the Congressional setting, constitutional interpretation is considered to be politically accountable.⁸⁴

The most influential element of this work for these purposes is the case developed by Tushnet that legislators should interpret the constitution in order to enhance the democratic legitimacy of constitutionalism:

The tension between constitutionalism and self-governance and the countermajoritarian difficulty would be substantially reduced if non judicial actors had incentives to interpret the constitution, and were at least as good as judges at doing so. We could get the benefits of constitutionalism and self-governance were the constitution’s primary interpreters nonjudicial actors who did a reasonably good job of interpretation.⁸⁵

Constitutional interpretation in the context of strong judicial review gives rise to a counter-majoritarian difficulty, but when it occurs within the

⁸² N Katyal, ‘Legislative Constitutional Interpretation’ (2001) 51 Duke Law Journal 1335, 1397.

⁸³ Katyal (n 82) 1338.

⁸⁴ Katyal (n 82) 1351.

⁸⁵ M Tushnet, ‘Interpretation in Legislatures and Courts: Incentives and Institutional Design’ in R Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 355.

majoritarian structure of the legislative process, it can produce an important political and legal effect that does not give rise to the same difficulties. In particular, it allows for constitutional norms to produce a substantive effect on the content of the law but without undermining the primacy of the democratic process. This argument is important because it alludes to the potential value of the practice, especially in terms of ‘taking the constitution away from the courts’, but does not explain the potential value of the practice for the legislative process itself.⁸⁶ This thesis seeks to focus on the question of why constitutional interpretation within the legislature might be valuable even without the presence of the counter-majoritarian difficulty that inspires the US debate. Tushnet also addresses the issue of how adequate constitutional interpretation should be identified in the legislative process, which he recognises is far from straightforward – in part because the methods used to identify it in courts cannot be easily translated into the legislative context.⁸⁷ Tushnet argues that we should use a constitution-based standard for evaluating Congressional constitutional interpretation:

Congressional performance is adequate, and congressional capacity to engage in good constitutional analysis is demonstrated, when those who refer to constitutional questions speak in ‘constitutionalist’ terms – connect their constitutional concerns and analyses to some broader ideas about constitutionalism, the separation of powers, and the rule of law, make reference to relevant

⁸⁶ M Tushnet, ‘Non-Judicial Review’ (2003) 40 *Harvard Journal on Legislation* 43; M Tushnet, *Taking the Constitution away from the courts* (Harvard University Press 1999).

⁸⁷ Tushnet, ‘Interpretation in Legislatures and Courts: Incentives and Institutional Design’ (n 85) 356-360.

constitutional provisions, and the like. The criterion, that is, is whether those participants who deal with constitutional questions appear to be thinking about those questions in the right way, with the constitution and constitutionalism in mind.⁸⁸

Tushnet argues that constitutional interpretation within the legislature should not be analysed through a prism of the author's own standard of constitutional interpretation, but rather it should be identified by focusing on examples whereby legislators consider themselves to be examining constitutional norms.⁸⁹ Tushnet calls for empirical analysis to serve as the basis for analysis of Congressional constitutional interpretation, and also to make use of case studies to analyse the practice.⁹⁰ Both in terms of substance and approach, Tushnet's writings on this subject have influenced the approach taken in this thesis.⁹¹

Jeremy Waldron, like Tushnet, has used scepticism of the democratic credentials of the judiciary as a basis for work that seeks to build and develop the recognition of the role of the legislative process within a constitutional state.⁹² Waldron's approach is more theoretical than Tushnet's, and has sparked renewed interest in the legislative process and

⁸⁸ M Tushnet, 'Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?' (2009) 89 Boston University Law Review 499, 503.

⁸⁹ M Tushnet, 'Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies' (1999) 50 Duke Law Journal 1395, 1401.

⁹⁰ Ibid.

⁹¹ For a review see: V Jackson, 'Multi-Valenced Constitutional Interpretation and constitutional comparisons: An essay in honour of Mark Tushnet' (2007-2008) 26 Quinnipiac Law Review 599.

⁹² J Waldron, *Law and Disagreement* (OUP 1999); J Waldron, *The Dignity of Legislation* (CUP 1999).

legislatures within political, constitutional and legal theory. Waldron argues that legislatures and the legislative process have been neglected by legal theory.⁹³ Waldron's defence of the role of disagreement in the legislative process has served to emphasise the virtues of legislatures as deliberative law-making arenas, as opposed to sites of crude political bargaining.⁹⁴ This awareness has led other legal theorists to call for re-evaluation of the nature of legislative reasoning and the role of the legislative process within a constitutional system.⁹⁵ This renewed interest in the legislative process provides an important context for understanding the role of parliamentary constitutional interpretation.

Waldron's writing on the legislature's role in relation to constitutional rights emphasises that legislative reasoning is capable of the sophistication associated with judicial decisions that use constitutional interpretation:

It is often thought that the great advantage of judicial decision-making on issues of individual rights is the explicit reasoning and reason-giving associated with it. Courts give reasons for their decisions, we are told, and this is a token of taking seriously what is at stake, whereas legislators do not. In fact this is a false contrast. Legislators give reasons for their votes just as judges do (...). The difference is that lawyers are trained to close study of the reasons

⁹³ J Waldron, *Law and Disagreement* (OUP 1999) 9-10.

⁹⁴ Ibid.

⁹⁵ See: R Ekins, *The Nature of Legislative Intent* (OUP, 2012); N Duxbury *Elements of Legislation* (CUP 2012); L Wintgens, 'Legisprudence as a New Theory of Legislation' (2006) 19 *Ratio Juris* 1.

judges give: they are not trained to close study of legislative reasoning.⁹⁶

This positive case for the role of constitutional rights within legislative deliberation has challenged assumptions on the role of a legislature in the realisation of rights. Although this study does not directly address constitutional interpretation in the context of rights, this literature has nonetheless proved influential in developing the arguments within this thesis. One of the most important recent works on this subject, which builds on Waldron's work, is Webber's *The Negotiable Constitution*.⁹⁷ Webber conceives a constitution as an 'activity', whereby rights are not simply limits upon legislative capacity, instead the legislature and the legislative process play a central role in constructing the scope and content of constitutional rights.⁹⁸ Webber emphasises that constitutional rights are not simply tools to be used by judges to restrict the legislative capacity of a legislature, but they are also designed to frame an on-going negotiation of a constitution within the legislative process.⁹⁹ A central component of Webber's argument is that the negotiability of constitutional rights is secured through limitation clauses within a charter of rights, which sets out the conditions for how limitations to the rights will be evaluated.¹⁰⁰ The key point being that as such rights are not absolute, the legislature is able to delineate how those rights influence the content of the law. One of the

⁹⁶ J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1382.

⁹⁷ G Webber, *The Negotiable Constitution: on the Limitation of Rights* (CUP 2009).

⁹⁸ Webber (n 97) 180.

⁹⁹ Webber (n 97) 215.

¹⁰⁰ Webber (n 97) 2.

reasons Webber's argument is particularly relevant to the whole of the UK constitution, and not just the HRA 1998, is that unlike many other constitutions all of the normative content of the UK constitution may be renegotiated within the ordinary legislative process. In legal terms, the UK constitution leaves the entire normative content of the constitution within the scope of primary legislation. Webber's analysis shows that rather than conceiving the UK's political constitution as being free of constitutional constraints, the political constitution can be conceived as granting parliamentarians the opportunity to decide how constitutional norms should be specified in primary legislation. Webber argues that primary legislation that specifies the content of constitutional rights should not be understood as interpretation, but instead should be seen as construction or specification; but this thesis argues that within Parliament, constitutional interpretation is central to the process of deciding how constitutional norms should be specified and constructed.¹⁰¹

Webber's work also fits with a positive conception of constitutionalism, which sees constitutional norms as facilitating, rather than simply limiting, the legislative process.¹⁰² In the United States, Ely famously argued that the primary justification for strong judicial review should be to safeguard the democratic process, rather than to determine the substantive values that should decide public policy.¹⁰³ Other constitutional scholars have sought to

¹⁰¹ Webber (n 97) 165-173.

¹⁰² S Holmes, *Passions and Constraints* (University of Chicago Press 1995) 6, 109.

¹⁰³ J Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 117.

build on this positive connection between democratic law-making and constitutionalism by articulating a connection between constitutional norms and the ideals of deliberative democracy.¹⁰⁴ Sunstein sees deliberative democracy and constitutionalism working together:

In a deliberative democracy one of the principal purposes of a constitution is to protect not the rule of the majority but democracy's internal morality, seen in deliberative terms.¹⁰⁵

The basic point is that constitutional norms can serve to frame and enhance democratic deliberation.¹⁰⁶ Constitutional theorists appear to be responding to the deliberative turn in democratic theory, and incorporating analysis of political deliberation within constitutionalism.¹⁰⁷ The increasing recognition of the value of legislative deliberation to both constitutionalism and to democracy underlines the potential significance of parliamentary constitutional interpretation, which is a practical manifestation of this connection between constitutional norms and democratic deliberation.

In the United Kingdom context, the connection between legislative deliberation and constitutionalism has received the most attention from those working on human rights. Sathanapally's *Beyond Disagreement*

¹⁰⁴ B Ackerman, *We the people foundations* (Harvard University Press 1991); J Habermas, *Between Facts and Norms: contributions to a discourse theory of Law and democracy* (MIT Press 1998); C Zurn, 'Deliberative Democracy and Constitutional Review' (2002) 21 *Law and Philosophy* 467; R Alexy, 'Balancing Constitutional Review and Representation' 3 (2005) 3 *International Journal of Constitutional Law* 572.

¹⁰⁵ C Sunstein, *Designing Democracy* (OUP 2001) 10.

¹⁰⁶ R Alexy, 'Balancing Constitutional Review and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 578-579.

¹⁰⁷ J Worley, 'Deliberative Constitutionalism' [2009] *Brigham Young University Law Review* 431.

examines the role of Parliament in engaging with human rights post-HRA.¹⁰⁸ Sathanapally focuses on parliamentary responses to section 4 declarations of incompatibility, and places the analysis within the context of debates within constitutional scholarship on the proper role of legislatures in the protection of constitutional rights.¹⁰⁹ A recent study by King focuses on the same subject matter but makes more use of empirical methods to highlight the nature of parliamentary responses to s 4 declarations.¹¹⁰ King notes that parliamentary responses to s 4 declarations do show ‘evidence of enhanced deliberative output’,¹¹¹ primarily because the debates show that minorities with ‘less voice’ are being taken into account.¹¹² These two works also fit within the ‘dialogue’ literature, which focuses on how constitutional rights can enhance the engagement between Parliament and the courts on questions of rights.¹¹³ There appears to be a consensus that the HRA 1998 has made a positive impact on parliamentary deliberation. Gardbaum argues that the HRA 1998 has created a system of ‘pre-enactment political rights review’, which has made rights more prominent within legislative debate.¹¹⁴ While most would accept that the HRA 1998

¹⁰⁸ A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012).

¹⁰⁹ Ibid.

¹¹⁰ J King, ‘Parliament’s Role Following s 4 Declarations of Incompatibility’ in M Hunt, H Hooper and P Yowell (eds), *Parliaments and Human Rights* (Hart 2015).

¹¹¹ King (n 110) 36.

¹¹² Ibid.

¹¹³ A Young, ‘Deference, Dialogue and the Search for Legitimacy’ (2010) 30 Oxford Journal of Legal Studies 815; T Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ (2005) Public Law 306; P Hogg and A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All) (1997) 35 Osgoode Hall Law Journal 75.

¹¹⁴ S Gardbaum, *Commonwealth Constitutionalism* (CUP 2013) 81.

has had a positive impact on parliamentary scrutiny, particularly via the JCHR,¹¹⁵ Hiebert has argued that the role of human rights post-2000 has fallen short of the culture of rights within Parliament that was promised by some of supporters of the 1998 Act.¹¹⁶ This thesis seeks to build on the body of work on HRA 1998 in Parliament, and to try to contribute to a more complete picture of the potential of constitutional interpretation by looking beyond the realm of individual rights.

In both Canada and Australia, there is an emerging literature on constitutional interpretation in their respective Parliaments. In Canada, Lajoie, Bergada and Gelineau have argued that constitutional interpretation is more than simply a having the last word via the notwithstanding clause in the Charter of Rights.¹¹⁷ They argue that constitutional interpretation is a major part of the parliamentary process, and often represents the ‘only word’ on the implications of the constitution upon primary legislation.¹¹⁸ In Australia, a recently published article, ‘Parliament’s Role in Constitutional Interpretation’ by Appleby and Webster, argues that Parliament should consider the High Court’s jurisprudence in its analysis of constitutional questions raised by Bills, and adopt ‘a court-centred interpretation’.¹¹⁹ Both

¹¹⁵ See M Hunt, H Hooper and P Yowell, *Parliaments and Human Rights* (AHRC 2012).

¹¹⁶ J Hiebert, ‘Governing under the Human Rights Act: The Limitations of Wishful Thinking,’ [2012] Public Law 29, 44.

¹¹⁷ A Lajoie, C Bergada and E Gelineau, ‘Legislatures as Constitutional Interpretation’ in R Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 385.

¹¹⁸ Ibid.

¹¹⁹ G Appleby and A Webster, ‘Parliament’s Role in Constitutional Interpretation’ (2013) 37 Melbourne University Law Review 255, 295.

recognise that the legislative process presents parliamentarians with the opportunity to consider questions of constitutional interpretation, and that parliamentarians have a duty to take up the responsibility of making a contribution to the meaning and application of constitutional norms.

Within UK public law scholarship, there are a small number of studies that consider the precise subject under consideration namely the role of constitutional norms within the legislative process in Parliament. Nicol's book *The Judicialisation of British Politics* examines the constitutional scrutiny of a number of constitutionally significant Bills.¹²⁰ The significance of this book for this study is covered in detail in Chapter 2. Oliver has written two important articles about the role of constitutional norms in enhancing legislative scrutiny in Parliament.¹²¹ Feldman has argued that constitutional principles and fundamental values, and not just human rights, play a key role in legislative scrutiny within Parliament.¹²² Literature on the role of Parliament in scrutinising constitutional reform is also directly relevant to this thesis.¹²³ Although there is not a significant amount of published research on the precise subject of this thesis in the United Kingdom, there is a great deal of research in law and politics that is directly relevant. Using a combination of empirical analysis and insight from this literature, this thesis aims to show that parliamentary constitutional

¹²⁰ Nicol (n 34).

¹²¹ D Oliver, 'Constitutional Scrutiny of Government Bill' (2004) 4 Macquarie Law Journal 33; D Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219.

¹²² D Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323.

¹²³ R Hazell, 'Time for a new convention: parliamentary scrutiny of constitutional bills 1997-2005' [2006] Public Law 247.

interpretation is a valuable addition to the UK public law vocabulary for understanding the role of Parliament within the contemporary constitution.

1.4 Structure

This thesis proceeds as follows. Chapter two set outs the methods used. It deals predominantly with the methods used to analyse constitutional interpretation within the case studies. Chapters three, four and five represent the empirical part of the thesis. Each is a case study of a Bill which contains significant examples of constitutional interpretation within Parliament. Chapter three examines the Public Bodies Bill; chapter four covers the Health and Social Care Bill; and chapter five details the Fixed-term Parliaments Bill. Each case study examines the constitutional framework of each Bill as introduced to Parliament, then analyses how parliamentarians interpreted that framework in order to debate the constitutional effect of each Bill. Chapter six builds on the analysis in the case studies to outline the value and character of parliamentary constitutional interpretation. The chapter explains how the parliamentary context affects the nature of constitutional interpretation. It also details the two key values of practice identified in the case studies. Chapter seven explores the relationship between parliamentary constitutional interpretation and political constitutionalism. Chapter eight concludes by assessing how the value of the practice might be used to assess parliamentary performance, and considers a number of reform options that would enhance constitutional interpretation in Parliament.

2. Methods

In a lecture given to inaugurate *The Journal of Legislative Studies*, JAG Griffith (1918-2010), the public lawyer who made major contributions to both the study of the UK constitution¹ and Parliament,² said:

It has always seemed to me a weakness in the study of politics and in the study of law that so often an intimate relationship is treated as no more than the chance meeting of two disparate disciplines.³

This study of parliamentary constitutional interpretation aims to overcome this weakness by engaging in empirical analysis of the legislative process, which is predominantly the domain of political science, but from the perspective of a public lawyer.

The legislative process is the institutional interface of politics and law.⁴ This dynamic combination of law and politics presents major methodological challenges for any study that seeks to engage in qualitative analysis of the legislative process within Parliament. These methodological challenges are

¹ JAG Griffith, *The Politics of the Judiciary* (Manchester University Press 1977); 'The Political Constitution' (1979) 42 *The Modern Law Review* 1; 'The common law and the political constitution' (2001) 117 *Law Quarterly Review* 42.

² See JAG Griffith, 'The Place of Parliament in the legislative process, Part I' (1951) 14 *The Modern Law Review* 279; 'The Place of Parliament in the legislative process, Part II' (1951) 14 *The Modern Law Review* 425; *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin, 1974); JAG Griffith, M Ryle, R Blackburn, A Kennon, and M Wheeler-Booth, *Griffith & Ryle on Parliament: functions, practice and procedures* (Sweet & Maxwell 2003).

³ JAG Griffith, 'The Study of Law of Politics' *The Journal of Legislative Studies* 1 (1995) 3, 3.

⁴ A Daniel Oliver-Lalana, 'The sources of legitimacy of political decisions: between procedure and substance' in L Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Ashgate 2005) 245.

exacerbated by the reliance on the publicly available material. Academic lawyers and political scientists take different approaches to this set of challenges.⁵ A lawyer might argue that it is not possible to divorce the analysis of the process from the substantive content of the particular proposal in question, whereas a political scientist might argue that analysis that focuses on the substance of debate will reveal very little, as it does not account for what really matters: the political affiliations of the participants, the behind the scenes negotiations and the distribution of political power. The reality is that both are right, and it should be acknowledged that the approach taken here, which emphasises the substantive analysis of the Bill during debate, is only one part of a broader and complicated picture. In any case it is difficult to be certain about the cause of legislative change within Parliament. Even what appears to be a clear Government concession secured by effective parliamentary scrutiny might in fact be what Cowley refers to as ‘carefully calibrated concessions’.⁶

The methods used in the thesis are designed to achieve the overarching research aim of identifying the value of parliamentary constitutional interpretation. For the purposes of the empirical analysis of constitutional interpretation in the parliamentary session of 2010-2012, this resulted in a case study approach. Within each of the case studies the overall research aim was broken down into three questions. Firstly, what were the main examples of constitutional

⁵ R Post, ‘Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guiner/Rosenberg Debate’ (2009) 89 Boston University Law Review 581.

⁶ P Cowley, *The Rebels: How Blair Mislaid his Majority* (Politico’s 2005) 91; See also M Shephard, ‘Parliamentary Scrutiny and Oversight of the British “War on Terror”: From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions’ (2009) 15 The Journal of Legislative Studies 191, 194.

interpretation during the passage of the Bill? Secondly, what were the normative components of the constitutional interpretation? And thirdly, how did the practice contribute to the passage of the Bill and to the constitution? The second part of the thesis uses the answers to these questions to build an account of the value of the practice and where it fits within accounts of constitutionalism.

The chapter begins with an examination of the parameters of constitutional interpretation in the context of the UK Parliament. It then sets out the methods chosen for the case studies via a review of the relevant literature, and ends with a brief review of the methods used in the second part of the thesis.

2.1 Defining parliamentary constitutional interpretation

This thesis is premised on the idea that parliamentary constitutional interpretation is a distinct form of reasoning within the UK Parliament's legislative process. This section puts forward the definition of the practice used and the basic parameters of the analysis of the primary material. This section is set out in the following order. Firstly, it explores the meaning of constitutional interpretation. Secondly, it explains how this translates to the context of the United Kingdom's uncodified constitution. Thirdly, it describes how the practice operates within the parliamentary legislative process.

2.1.1 Constitutional interpretation

Constitutional interpretation is a 'practical human activity'.⁷ Defined in the most basic terms, constitutional interpretation is the practical activity of interpreting a constitutional norm. American law journals are filled with articles on constitutional interpretation, but relatively few tackle the descriptive question of what constitutional interpretation is.⁸ Steven Smith has pointed out that constitutional interpretation is a facilitative equivocation.⁹ The term is often used despite the fact that there is much disagreement over what it means, and without acknowledgment of that disagreement or any clarification of the definition from the user. Much of the disagreement is over what 'constitutional' means and how constitutional meaning should be found, which is dependent on the context. Defining constitutional interpretation outside of a particular context is therefore predominantly a question of defining the meaning of 'interpretation'.

The meaning of interpretation has attracted much attention in legal and political philosophy, notably in the work of Dworkin,¹⁰ Raz,¹¹ Marmor¹² and Fish.¹³ The aim is here is not to engage directly with these debates, but to highlight some of

⁷ S Smith, 'What Does Constitutional Interpretation Interpret?' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) 22.

⁸ Ibid.

⁹ Smith (n 7) 34-37.

¹⁰ R Dworkin, *A Matter of Principle* (Harvard University Press 1985); *Law's Empire* (Harvard University Press 1986); *Justice for Hedgehogs* (Harvard University Press 2011).

¹¹ J Raz, *Between Authority and Interpretation* (OUP 2010); *Practical Reason and Norms* (Princeton University Press 1990); *The Concept of a Legal System* (OUP 1980).

¹² A Marmor, *Interpretation and Legal Theory* (Hart 2005).

¹³ S Fish, *Doing What Comes Naturally* (OUP 1989).

the basic features of interpretation that distinguish it from other forms of reasoning. Raz explains:

Interpretation is of meaning; that it not only establishes what the meaning is, but makes it transparent, that it is intelligible, and that therefore interpretation is backed by constitutive reasons.¹⁴

According to this account, interpretation involves explaining the meaning of something using reasons. Raz says that interpretation ‘is closely related to explanation’.¹⁵ Interpretation is a demanding form of explanation. It demands constitutive reasons. He suggests that the following four elements help to distinguish interpretation as an ‘activity’ when it is used in the humanities:

‘(1) Interpretation is of an original. There is always something which is interpreted... (2) An interpretation states, or shows (eg in performing interpretations) the meaning of the original. (3) Interpretations are subject to assessment as right or wrong (correct or incorrect), or as good or bad... (4) Interpretation is an intentional act. One does not interpret unless one intends to interpret...’¹⁶

I take the following from Raz’s exploration of the meaning of interpretation. Firstly, interpretation normally involves the exploration of the meaning of an object. Secondly, the process of interpretation often ends with an explanation of the meaning of that object. Thirdly, that the quality of interpretation can be enhanced if it is supported by constitutive reasons. Constitutive reasons explain how the object has been interpreted, they support an argument that relates to why

¹⁴ J Raz, *Between Authority and Interpretation* (OUP 2010) 230.

¹⁵ Raz (n 14) 266.

¹⁶ Raz (n 14) 268.

something is the case.¹⁷ Interpretation, then, is a process of exploring the meaning of an object that ends with a determination and is supported by reasons. According to this approach, constitutional interpretation refers to the explanation of the meaning of an 'object' which is considered constitutional.

One of the reasons why constitutional interpretation is primarily associated with courts is that some consider that it is fundamental to the practice that it should be authoritative.¹⁸ Palmer defines constitutional interpretation as 'the determination, authoritative in practice, of what an element of the constitution means as applied to a particular instance of doubt or dispute'.¹⁹ Thought of, in this way, constitutional interpretation might be limited to courts, but Palmer also considers that the law officers within Government make authoritative determinations and therefore engage in constitutional interpretation.²⁰ Webber, citing Whittington, suggests that interpretation is an 'essentially legalistic' activity.²¹ Webber argues that instead that the process of developing the meaning of a right should be understood as 'construction', because the latter term allows meaning external to the text of a right to be used to specify the meaning of a right.²² Construction by contrast to interpretation is 'essentially political'.²³

¹⁷ J Hage, *Studies in Legal Logic* (Springer 2005) 77.

¹⁸ M Troper, 'Constitutional Interpretation' (2006) 39 *Israel Law Review* 35.

¹⁹ M Palmer, 'What is the New Zealand Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office Holders' (2006) 17 *Public Law Review* 133, 149.

²⁰ *Ibid.*

²¹ G Webber, *The Negotiable Constitution: on the Limitation of Rights* (CUP 2009) 168.

²² Webber (n 21) 166.

²³ Webber (n 21) 168.

While it is correct to recognise that authoritative forms of constitutional interpretation are likely to be highly significant, it seems unnecessarily restrictive to limit the definition so that it only refers to such contexts. Surely constitutional interpretation, like statutory and legal interpretation, is a practical form of reasoning that can occur in multiple and non-authoritative contexts. Further, to regard interpretation as necessarily ‘legalistic’ is problematic. In the legislative process, interpreting the meaning of either a clause in a Bill or a constitutional principle is a very different activity to that performed by courts. Within the legislature the political nature of the interpretation means that the restrictions associated with the practice in the legal context are less relevant. Feldman puts forward an account of constitutional interpretation that rejects the notion that the practice must be authoritative and that it is limited to the interpretation of a codified constitutional text:

The first task of the constitutional interpreter is to present what seems to him or her to be the best, or most legitimate, form of allocation of functions, powers and duties between institutions, and the proper restrictions on them, having regard to the matrix of textual and non-textual rules and practices recognized by constitutional actors in the state,²⁴

Feldman’s approach reflects the fact that for him, constitutional interpretation is something that is done by ‘all public officials and constitutional commentators’.²⁵

This fits with the approach of a number of scholars of constitutional law around

²⁴ D Feldman, ‘Factors affecting the Choice of Techniques of Constitutional Interpretation’ in Ferdinand Mélin-Soucramanien (ed), *L’Interprétation Constitutionnelle* (Daloz 2005) 2.

²⁵ Feldman, ‘Factors affecting the Choice of Techniques of Constitutional Interpretation’ (n 24) 3.

the world, particularly in the United States, who regard constitutional interpretation as a practice that occurs in many different contexts, including the legislature.²⁶ One of the reasons to value constitutional interpretation outside of the courts, is precisely because within a political context, interpreters can afford to be more creative, and less legalistic in their approach to deciding the meaning of a particular constitutional norm.

2.1.2 What counts as constitutional in the United Kingdom?

A more difficult definitional question for this project is to decide what counts as ‘constitutional’ in the United Kingdom. In order for constitutional interpretation to be distinguished from other forms of reasoning, arguably it must be possible to determine whether the object of interpretation is constitutional. The uncodified nature of the UK constitution makes this difficult.²⁷ This subsection explains this thesis’ basic approach to determining what counts as a ‘constitutional’ norm for the purposes of parliamentary constitutional interpretation.

The definition of constitutional interpretation used here refers to the interpretation of a constitutional norm rather than simply constitutional law. Wheare defines the constitution as ‘the collection of legal rules and non-legal rules which govern the Government in Britain’.²⁸ Non-legal rules are a key part of the UK constitution, as they are in many countries which have codified constitutions, and this means that what constitutional interpretation interprets

²⁶ See 1.4; for example M Tushnet, ‘Some Observations on Legislative Capacity in Constitutional Interpretation’ (2008) 2 *Legisprudence* 163.

²⁷ House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (HL 2001-02 69) para 60.

²⁸ K Wheare, *Modern Constitutions* (OUP 1960) 21.

must in the UK context refer to more than just the interpretation of law. Constitutional principles, conventions and practices are all constitutional norms that are subject to constitutional interpretation. The importance of the interpretation of non-legal constitutional norms highlights the point that constitutional interpretation can be non-authoritative and non-binding. Ultimately, in any context constitutional interpretation does not normally only refer to the authoritative interpretation of a codified constitution.

Deciding what counts as constitutional is considered to be wholly subjective by some. Jennings made the point in the following terms:

What is in the constitution is “constitutional”, what is not in it is not “constitutional”. But where there is no such document it is quite impossible to make a distinction which is not purely personal and subjective.²⁹

The current Government agrees with this assessment.³⁰ The danger is that in arriving at my own subjective definition of what is ‘constitutional’, the thesis will present an account of constitutional interpretation that is divorced from the reality of the political context. It is also worth noting that the very notion of interpreting the UK constitution is unrealistic according to some accounts, in the sense that some take a non-normative view of the UK constitution. Bogdanor described the constitution as ‘a resume of historical experience, rather than a set of normative

²⁹ I Jennings, *The Law and the Constitution* (5th Edition, University of London Press 1959) 38.

³⁰ Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation: Government Response to the Committee's First Report of Session 2013–14* (HC 2013-14 611) paras 58-60.

principles’.³¹ While Griffith’s famously claimed that ‘the constitution of the United Kingdom lives on, changing from day to day, for the constitution is no more and no less than what happens’.³² Each of these statements are right in their own terms, but they are also misleading in the sense that they do not recognise that the constitution is made up of norms that dictate how laws should be made and Government power exercised.³³ It is these norms that are the subject of constitutional interpretation.

One of the most important categories of constitutional norms in the United Kingdom is constitutional legislation. This increasingly prominent category of constitutional norms is one of the most prominent subjects of constitutional interpretation. Hazell describes them as ‘in quantitative terms... the most important single source of constitutional law in the United Kingdom’.³⁴ He also recognises that ‘there is no clear classification of what is a constitutional Bill and what is not, and with our unwritten constitution it is impossible to devise one’.³⁵ Famously, Laws LJ attempted to do precisely that in the case of *Thoburn v Sunderland City Council*:

A constitutional statute is one which (a) conditions the legal relationship between the citizen and State in some general, overarching manner, or (b)

³¹ V Bogdanor, ‘Constitutional Law and Politics’ (1987) 7 Oxford Journal of Legal Studies 454, 456.

³² JAG Griffith, ‘The Political Constitution’ (1979) 42 Modern Law Review 1, 19.

³³ A Goodhart, ‘The Rule of Law and Absolute Sovereignty’ (1958) 106 University of Pennsylvania Law Review 943, 951.

³⁴ R Hazell, ‘Time for a new convention: parliamentary scrutiny of constitutional bills 1997-2005’ [2006] Public Law 247, 247.

³⁵ Hazell (n 34) 271.

enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.³⁶

He went on to explain that constitutional statutes could not be subject to implied repeal. This challenged the idea that parliamentary sovereignty prevented the legal system recognising a hierarchy in the legal status of the Acts of Parliament. Laws LJ gave the example of the EC Act 1972, which he said was ‘by force of common law, a constitutional statute’.³⁷

Feldman has recently provided a powerful critique of Laws’ approach.³⁸ Feldman argues that there is a problem with connecting ‘constitutional’ to fundamental rights. The basic problem is two-fold. Firstly, some constitutional legislation is not concerned with rights, in other words it is under-inclusive.³⁹ Secondly, it is also over-inclusive because some very technical legislation enlarges or diminishes the scope of fundamental rights but does not merit the adjective ‘constitutional’.⁴⁰ Instead Feldman recommends ‘an institutional approach’ as an alternative:

Constitutional legislation establishes state institutions and confers functions, responsibilities and powers on them. Such legislation constitutes the state and lays out its structure. These are important, and I suggest core, functions of a constitution. An institutional approach may be particularly valuable in the United Kingdom, both because not all

³⁶ [2002] EWHC 195 (Admin).

³⁷ Ibid.

³⁸ D Feldman, ‘The Nature and Significance of "Constitutional" Legislation’ (2013) 129 Law Quarterly Review 343.

³⁹ Feldman, ‘The Nature and Significance of "Constitutional" Legislation’ (n 38) 347.

⁴⁰ Feldman, ‘The Nature and Significance of "Constitutional" Legislation’ (n 38) 348.

constitutions recognise fundamental rights, and because the key function of a constitution is (in my view) to constitute the state and its institutions and confer functions, powers and duties on them.⁴¹

Feldman's focus on the role of constitutional law in establishing and regulating the key institutions of state is an important reminder that there is a significant body of constitutional norms that are not rights. These norms are particularly important to Parliament, because it is responsible for defending the role of the parliamentary process within the constitution. Feldman also challenges Laws' approach by arguing that entire Acts should not be classified as constitutional, but rather we should focus upon the status of individual provisions.⁴² This is also an important point for my approach, in the sense that the object of constitutional interpretation need not be a whole Bill or Act that is considered to be constitutional. Instead, a specific provision within a Bill or an Act can be considered to have constitutional effect even if the general subject matter of the Bill or Act is not constitutional. Rather than the focus on the whether an Act has constitutional status, it is better to consider whether the substance of a specific provision can be considered constitutional.⁴³

There are important differences of opinion about the precise boundaries of this category, but outside of the Government, particularly within the courts, it is widely accepted that the category exists, and that it has important implications. In *Robinson v Secretary of State for Northern Ireland*, Lord Bingham said that

⁴¹ Feldman, 'The Nature and Significance of "Constitutional" Legislation' (n 38) 350.

⁴² Feldman, 'The Nature and Significance of "Constitutional" Legislation' (n 38) 353.

⁴³ A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 294.

because the Northern Ireland Act 1998 was ‘in effect a constitution’, then the provisions should be interpreted purposively.⁴⁴ Most recently, in the *HS2* case, Lord Neuberger and Lord Mance said the following:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.⁴⁵

There is a great deal worth unpicking in this paragraph; however, the most significant for these purposes is the recognition of a distinct category of constitutional norms. The approach of Lord Mance and Lord Neuberger may be different from other constitutional actors, but there can be little doubt that the distinction between ordinary and constitutional law is now firmly part of UK constitutional discourse. In the courts, leading judges have developed a number

⁴⁴ [2002] UKHL 32.

⁴⁵ *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 200.

of distinct approaches to the interpretation of constitutional legislation. The aim of this thesis is to examine the approach of parliamentarians.

In order to side step the problems associated with subjectivity, my approach to the definition of what counts as constitutional is to rely upon the definition offered by the Constitution Committee:

The set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.⁴⁶

This broad working definition is helpful because it highlights the breadth of norms, both in form and function, which can be considered constitutional within Parliament. The Committee then added that the constitution is also made up of the following five tenets:

- Sovereignty of the Crown in Parliament
- The Rule of Law, encompassing the rights of the individual
- Union State
- Representative Government
- Membership of the Commonwealth, the European Union, and other international organisations.⁴⁷

In a later report, on the subject of constitutional change, the Committee explained that the fact that there is not a ‘watertight’ definition of what counts as

⁴⁶ House of Lords Select Committee on the Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001-02 11) para 20.

⁴⁷ House of Lords Select Committee on the Constitution Committee (n 46) para 21.

‘constitutional’ in the United Kingdom does not mean that it is not possible in practice to identify norms that are ‘constitutional’.⁴⁸ While it is important not to assume that the Committee’s definition represents Parliament’s position, at the same time this project aims to present a realistic account of the approach taken within what is the relevant ‘interpretive community’.⁴⁹ Although parliamentarians and the Constitution Committee do not explicitly consider themselves to be engaged in constitutional interpretation, this thesis is not seeking to impose an externally formulated account of what counts as constitutional. The aim is to analyse the practice through the lens of what parliamentarians considered to be constitutional. As Llewellyn points out, institutions are responsible for determining how much weight to place upon particular constitutional norms and which norms to validate; the norms do not validate the institutions.⁵⁰

The uncodified status of the UK constitution does make a major difference to how Parliament interprets constitutional norms. One of the motivating factors behind this thesis is to identify what difference the absence of codification makes. At the same time, the absence of an objective or technical definition of what counts as a constitutional norm does not mean that the interpretation of constitutional norms does not occur. It is important not to exaggerate the uncertainty caused by the nature of the constitution. There is a consensus within the UK on the constitutional status of a number of norms, and in many cases

⁴⁸ House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (HL 2010-12 177) para 7.

⁴⁹ S Fish, *Doing What Comes Naturally* (OUP 1989) 153.

⁵⁰ K Llewellyn, ‘The Constitution as an Institution’ (1934) 34 *Columbia Law Review* 1, 19.

there is also a consensus within Parliament that a particular Bill or clause has ‘constitutional implications’.

2.1.3 Parliamentary constitutional interpretation

One of the motivations of this thesis is to outline how the parliamentary context influences the value and character of constitutional interpretation. It is clear that the perspective of the institution is partly responsible for the nature of the constitutional interpretation that occurs within it.⁵¹ The important preliminary question addressed here is: to what does parliamentary constitutional interpretation refer? The answer to this question determines the basic parameters of the thesis. The previous chapter set out the basic approach, and the aim of this section is to set out in some detail what counts as an example of the practice.

The review of the relevant literature did not produce any research which sought to systematically examine the role constitutional interpretation has within the parliamentary legislative process in the UK. There is a growing body of research on the role of human rights and constitutional norms within Parliament, and some of this work highlights the distinctive features of Parliament’s approach to the application of these norms, and particularly committees.⁵² Much of the significant body of work in the United States on constitutional interpretation within the

⁵¹ W Blatt, ‘Interpretive Communities: The Missing Ingredient in Statutory Interpretation’ (2000-2001) 95 Northwestern University Law Review 629, 639; Feldman, ‘Factors affecting the Choice of Techniques of Constitutional Interpretation’ (n 24).

⁵² A representative sample of this work would include: A Sathanapally, *Beyond Disagreement* (OUP 2012); D Feldman, “The Impact of Human Rights on the UK Legislative Process” (2004) 25 Statute Law Review 91, 104–115; J Hiebert, ‘Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?’ (2006) 4 International Journal of Constitutional Law 1.

legislature does not explain the precise boundaries of what counts as part of the practice, in part because it is rare for it to directly engage with empirical analysis of the legislative process.⁵³ As a consequence, this thesis sets its own distinct parameters of parliamentary constitutional interpretation. It would be wrong to imply that this thesis began with a prejudged idea of how constitutional interpretation operates within the parliamentary context. One of the aims of the empirical work was to learn more about the character of the practice. The approach used was open-minded at the outset, but some basic criteria were developed to inform my analysis.

For the purposes of this thesis ‘parliamentary’ refers to legislative deliberation within Parliament. Constitutional interpretation outside of the legislative process was excluded.⁵⁴ This decision was in part designed to narrow the focus, but also to reflect the fact that interpretation is, in my view, such an important part of the process of legislative debate and scrutiny within Parliament. A significant proportion of the debate in Parliament on Bills and clauses turns on how they are interpreted. As Oliver-Lalana points out, a key feature of parliamentary argumentation, is that parliamentarians take interpretive standpoints on legal

⁵³ N Katyal, *Legislative Constitutional Interpretation* (2001) 51 *Duke Law Journal* 1335; R Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006); N Devins and L Fisher, *The Democratic Constitution* (OUP 2004); N Devins and K Whittington, *Congress and the Constitution* (Duke University Press 2005).

⁵⁴ For analysis of the use of constitutional principles within Parliament but outside of the legislative context see: D Nicol, ‘Legitimacy of the Commons Debate on Prisoner Voting’ [2011] *Public Law* 681; S Fredman, ‘From dialogue to deliberation: human rights adjudication and prisoners’ rights to vote’ [2013] *Public Law* 292; G Phillipson, ‘Historic’ Commons’ Syria vote: the constitutional significance (Part I)’ and ‘Historic’ Commons’ Syria vote: the constitutional significance. Part II – the Way Forward’ *UK Constitutional Law Blog* (29th November 2013) (both available at <http://ukconstitutionallaw.org>).

norms, including both on clauses within a Bill and existing legal and constitutional norms.⁵⁵ Even in the context of the legislative process, it is difficult to determine the precise boundaries of the practice. In one article on constitutional interpretation in the Canadian federal and provincial legislatures, Lajoie et al suggest that constitutional interpretation can refer to all legislative enactments, on the basis that there is the implicit decision that the legislation is within their jurisdiction.⁵⁶ The problem with this approach is that, as Tushnet indicates, it is probably too generous.⁵⁷ It assumes that the legislature has engaged in constitutional interpretation, even when legislators may not even have considered the constitutional implications of the change to the law enacted. Further, this approach does not fit within the UK constitutional context, where constitutionality does not determine the legality of an Act of Parliament. On the other hand, to focus only on explicit examples of constitutional interpretation will result in analysis of a narrow subset of participants.⁵⁸

For the purpose of identifying examples of parliamentary constitutional interpretation, the following definition was used:

The interpretation of the constitutional effect of a Bill by a parliamentary actor during the legislative process in Parliament.

This definition captures two main uses of the practice. The first use of the practice is when a parliamentarian interprets a constitutional norm as part of the

⁵⁵ Daniel Oliver-Lalana (n 4) 245.

⁵⁶ A Lajoie, C Bergada and E Gelineau, 'Legislatures as Constitutional Interpretation' in R Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 390-391.

⁵⁷ M Tushnet, 'Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?' (2009) 89 Boston University Law Review 499, 503.

⁵⁸ Ibid.

debate on the content of a Bill. In this scenario the constitutional norm in question, the object of interpretation, can either be a pre-existing constitutional norm, for example a constitutionally significant provision (such as the section 1 of the Constitutional Reform Act) or a non-legal constitutional norm, or it can refer to a clause within the Bill that is being considered. If a Bill proposes to introduce a new constitutional norm, for example the establishment of the Scottish Parliament (section 1 of the Scotland Act 1998), then the interpretation of the relevant provision within the debate is a form of constitutional interpretation. When the norm in question is not part of the Bill being debated, it is used to identify the constitutional effect of a Bill. For example, the rule of law might be used to highlight the constitutional effect of a clause with retrospective legal effect. The second use of the practice is when the interpreter is interpreting the constitutional effect of a Bill, or a particular clause, but without referring to a pre-existing constitutional norm or to a clause within a Bill that could be considered a constitutional norm. In this scenario, the object of interpretation is the constitutional effect of a clause that is not a constitutional norm, but is a clause that is considered to have constitutional effect. An example of this second scenario is a Henry VIII power or clause, which grants a Minister a power to make secondary legislation that can amend primary legislation for a particular purpose. Such a clause regulates the relationship between the Government and Parliament, but is not a constitutional norm in the conventional sense, in part because it only would normally only apply to a particular context, for example public bodies. The identification of this second use of the practice was based on the fact that at some point in the parliamentary process, a parliamentary actor, for example the Constitution Committee, regarded a clause as having constitutional

effect. Once a clause is identified as being constitutional significant within Parliament, the entire parliamentary debate on that particular clause was examined to identify examples of the interpretation of the constitutional effect of the clause. In this context constitutional interpretation need not refer to a particular constitutional norm, as a parliamentarians' analysis of the merits of such clause is considered to form part of Parliament's identification of the constitutional effect of a Bill.

The parliamentary legislative process guided the parameters used to define the practice for this project. Contributions to debate, individual amendments and parliamentary reports need to be understood in the context of the content of the Bill being considered, and most importantly the parliamentary debate from which they form a part. Contributions to debate cannot always be evaluated outside of the context of the total deliberations of the Bill. The aim of the analysis is not to evaluate the interpretation of individual parliamentarians or parliamentary committees, but rather to analyse the use of constitutional interpretation in the context of the complete parliamentary journey of a particular Bill.⁵⁹ The relevant unit of analysis is the overall institutional performance of Parliament during the passage of the Bill, from introduction to Royal Assent. To engage in any form of analysis that seeks to evaluate how a parliament or legislature contributes to the

⁵⁹ M Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in R Bauman and T Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 371; N Katyal, *Legislative Constitutional Interpretation* (2001) 51 *Duke Law Journal* 1335, 1397; M Tushnet, 'Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies' (1999) 50 *Duke Law Journal* 1395, 1398.

legislative process through debates and amendments, it is necessary to take into account the entire process.⁶⁰

2.2 Methods in the relevant literature

Empirical analysis of the legislative process poses many methodological difficulties. The difficulty for this thesis, which is conceived as an exercise in the academic discipline of law, is that there is no established clearly articulated legal method for qualitative analysis of the legislative process. Research in political science on the legislative process has many important lessons for this project. However, a significant proportion of the methods used in that literature are designed to produce causal claims, based on testing variables and hypotheses.⁶¹ Such methods are not suited to this thesis's research aims. This thesis does not attempt to measure the influence or impact of parliamentary constitutional interpretation on legislation. Instead the aims are to identify the character and value of the practice. These aims require detailed engagement with substance of parliamentary negotiations on a Bill, and therefore rely upon different methods from those that are used to measure the influence of legislative scrutiny on legislative outcomes. This section reviews the methods used by studies of the legislative process in the UK in both law and political science.

⁶⁰ F Hage and M Kaeding, 'Reconsidering the European Parliament's Legislative Influence: Formal vs Informal Procedures' (2007) 29 *Journal of European Integration* 341, 351.

⁶¹ R Post, 'Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guiner/Rosenberg Debate' (2009) 89 *Boston University Law Review* 581, 584.

2.2.1 Public law and the parliamentary legislative process in Westminster

Danny Nicol's *EC Membership and the Judicialisation of British Politics*, published in 2001, is a rare example of a study of Parliament's legislative deliberation from the perspective of a public lawyer.⁶² The object of the book is to examine 'what was in the mind of Parliament when it passed the European Communities Act 1972 and other statutes which have incorporated European law into our law'.⁶³ He describes his task 'as to assess how widespread and how deep were parliamentary understandings of the constitutional law implications of membership'.⁶⁴ The study relies upon the parliamentary debates in *Hansard* as the primary material. The book contains a number of case studies of the passage of different Bills. Each study relies upon qualitative analysis of Parliament's deliberations to probe the extent to which parliamentarians 'understood' the implications of the Bill or Bill(s) in question. The key feature of Nicol's research, for my purposes, is that it uses a subject-specific approach to qualitative analysis of the legislative process. Nicol uses his understanding of the constitutional implications of the relevant Bills to analyse the strength and weaknesses of the parliamentary deliberation. The detailed chronological analysis of the debate allows Nicol to draw some important conclusions on the factors that can affect the substance of parliamentary deliberation. For example, Nicol notes that during the passage of the European Communities Act 1972, the Government failed to deliver a consistent message on the constitutional impact of the Bill that in turn hindered effective consideration of the relevant issues.⁶⁵

⁶² D Nicol, *EC Membership and the Judicialisation of British Politics* (OUP 2001).

⁶³ Nicol (n 62) ix.

⁶⁴ Ibid.

⁶⁵ Nicol (n 62) 115.

Nicol's work is also important because it includes an explanation of the limitations of *Hansard* analysis. A particular problem for his project is that his main research question is to assess parliamentarians' 'understanding' and this is arguably very difficult to establish from *Hansard*. Nicol acknowledges this point: 'what parliamentarians said may not correspond with what they knew or believed'.⁶⁶ Nicol also defends the value of systematic *Hansard* analysis. He argues that despite its methodological shortcomings it remains better than reliance on random quotations.⁶⁷

Nicol's analytical approach to the case study of the European Communities Bill is particularly effective. Unlike the other chapters, it focuses exclusively on the passage of that one constitutionally significant Bill. It assesses the 'adequacy of the consideration of the constitutional issues' within the debate.⁶⁸ It begins with a survey of the debate on the constitutional implications of the Bill that occurred in the run up to its parliamentary consideration.⁶⁹ This provides the normative background for analysis of the form of the Bill as it was introduced. The analysis of the legislative passage of the Bill is divided by topic rather than simply by chronology. Nicol is able to use his understanding of the constitution to analyse the subjects examined within the debate on the Bill, for example a proposed amendment to the Bill that would have declared the 'Ultimate Sovereignty of Parliament'.⁷⁰ His analysis of the legislative process is interwoven with academic

⁶⁶ Nicol (n 62) ix.

⁶⁷ Ibid.

⁶⁸ Nicol (n 62) 76.

⁶⁹ Nicol (n 62) 76-81.

⁷⁰ Nicol (n 62) 94.

discussion of the issues at stake and this effectively conveys the nuances of the normative contours of the scrutiny of the Bill. Nicol's approach to the qualitative analysis of the parliamentary deliberation provides a useful template for this thesis.

There are a number of examples of article-length studies in public law that provide narrative accounts of the passage of constitutionally significant legislation. Rawlings' account of the passage of the European Communities (Amendment) Bill is notable for the way it manages to weave analysis of the constitutional context with detailed analysis of both the legal and parliamentary technicalities that animated the passage of this politically controversial Bill.⁷¹ Davis's study of the passage of the Legislative and Regulatory Reform Act 2006 combines an explanation of the influence of parliamentary scrutiny with analysis of the substance of the Bill.⁷² Horne and Walker's recent evaluation of the parliamentary scrutiny of the Terrorism, Prevention and Investigation Measures Act 2011 and the Prevention of Terrorism Act 2005 is another important example of this form of analysis.⁷³ Horne and Walker test the scrutiny of both Bills against the 'assertions of political constitutionalism'.⁷⁴ Each of these examples shows that a narrative account of the passage of a Bill can form the basis of qualitative analysis of the legislative process. The Hansard Society has also produced

⁷¹ R Rawlings, 'Legal politics: the United Kingdom and ratification of the Treaty on European Union: Part 1' [1994] Public Law 254.

⁷² P Davis, 'The Significance of Parliamentary Procedures in Control of the Executive: a Case Study: the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006' [2007] Public Law 677.

⁷³ A Horne and C Walker, 'Lessons learned from political constitutionalism? Comparing the enactment of control orders and terrorism prevention and investigation measures by the UK Parliament' [2014] Public Law 267.

⁷⁴ Horne and Walker (n 73) 269.

important publications that contain a number of in depth case studies of specific Bills.⁷⁵ They use a narrative model as the basis to make a number of concrete recommendations to improve the legislative process.

Parliaments and Human Rights is another important recent contribution to the public law literature on Parliament.⁷⁶ The report by Murray Hunt, Hayley Hooper and Paul Yowell identifies and evaluates references to the JCHR in Parliament since 2000. The research goals of their report are very different to those of this thesis, and those of the public law studies examined above. Their overall aim is to ascertain how debate in Parliament on human rights has changed since 2000.⁷⁷ The key difference is that they use a quantitative approach as the basis of their qualitative analysis. The methods used are nonetheless worth setting out in detail in order to highlight the differences between their approach and the case study method detailed above.

The first aim of the report's analysis of parliamentary debates is to identify substantive references to JCHR reports. A substantive reference is one that makes use of the content of the report in some way, rather than simply a mere mention of the JCHR.⁷⁸ The methodology was to use the JUSTIS Parliament database to search for references to the JCHR and then the results were classified as either

⁷⁵ See The Hansard Society, *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (The Hansard Society 1993); The Hansard Society, *Law in the Making* (The Hansard Society 2008); See also S Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 *Parliamentary Affairs* 694.

⁷⁶ M Hunt, H Hooper and P Yowell, *Parliaments and Human Rights* (AHRC 2012).

⁷⁷ Hunt, Hooper and Yowell (n 76) 17.

⁷⁸ Hunt, Hooper and Yowell (n 76) 20-21.

substantive or non-substantive.⁷⁹ The resulting data showed a marked increase in the number of substantive references in the 2005-2010 Parliament compared to the 2000-05 Parliament.⁸⁰ On the basis of this finding, the authors decided to focus their quantitative analysis of the data on the substantive references to the JCHR during the 2005-2010 Parliament. The authors analysed the quantitative data, and the report uses a table to show who makes use of the reports and how they are used. This produced some noteworthy findings. For example, the report notes that the six of the members of the JCHR came in the top seven of the high-frequency users of the reports.⁸¹ The report also shows that 60% of substantive references came in the context of legislative scrutiny.⁸²

The second objective of the analysis of the references to the JCHR in parliamentary debate is to ‘evaluate parliamentary deliberation with respect to arguments referring to JCHR reports and the effect of the work of the JCHR on parliamentary debate about human rights’.⁸³ To do this, the report uses an evaluative framework of five main considerations:

1. What use was made, explicitly or implicitly, of human rights sources in the debate?
2. What use was made, explicitly or implicitly, of the concept of proportionality?
3. Has the work of the JCHR led the Government to provide more detailed justification for laws and policies affecting human rights?

⁷⁹ Hunt, Hooper and Yowell (n 76) 20.

⁸⁰ Hunt, Hooper and Yowell (n 76) 22.

⁸¹ Hunt, Hooper and Yowell (n 76) 24-25.

⁸² Hunt, Hooper and Yowell (n 76) 30.

⁸³ Hunt, Hooper and Yowell (n 76) 37.

4. Has the work of the JCHR framed, stimulated or influenced debate in Parliament?
5. Has the work of the JCHR led to more informed debate in Parliament?

To answer these questions the report uses qualitative analysis of some of the substantive references documented by the search of the parliamentary debates. For example, in relation to question 1, the report concludes that the reports of the JCHR have provided a framework for discussing human rights issues within Parliament.⁸⁴ However, the answers to some of the questions asked, particularly question 3, highlight the limitations of the quantitative approach to analysis. The quantitative data produced provides a limited basis for addressing some of the questions that relate to the nature of the JCHR's influence on the legislative process. For these points, the report relied on the substantive references produced by their database search, and oral evidence obtained from parliamentarians.⁸⁵ The limits of this approach made it difficult for the report to explain in much depth how the reports of the JCHR influence legislative debate. They acknowledge these limitations, but one wonders if the answers to these evaluative questions may have been better served by looking at a smaller data sample in greater depth.

These legal studies of the content of parliamentary debate in Westminster provide important lessons for this thesis' methodology. Nicol's study highlights the benefits of an in depth case study approach, which uses a contextual narrative to demonstrate how the content of the debate develops, and how different factors affect the quality of Parliament's deliberation. In contrast, *Parliaments and*

⁸⁴ Hunt, Hooper and Yowell (n 76) 40.

⁸⁵ Hunt, Hooper and Yowell (n 76) 44.

Human Rights relies predominantly on quantitative analysis, and this provides an important insight into the role of the JCHR within Parliament over a ten-year period. However, the benefit of these insights is offset by the absence of detailed qualitative analysis of the contribution that the reports of JCHR make to Parliament.⁸⁶

2.2.2 Political science

Political science places a greater emphasis on empirical methods than legal scholarship, and there are a number of studies of the UK legislative process within political science that rely on sophisticated empirical methods. Despite this, there have been relatively few large-scale studies of the UK legislative process.⁸⁷ The major difference between the disciplines is that many political scientists are ‘non-normative’ in their approach,⁸⁸ meaning that they tend to treat the legislative process predominantly as a power broking process, and this does not always adequately reflect the ‘legal’ elements of the procedure.⁸⁹ However, despite this and other differences there is much that can be learnt from their approach to analysing the legislative process within Parliament. This section reviews some of the most notable studies and highlights which aspects inform my own approach.

⁸⁶ It should be noted that a number recent studies of the Human Rights Act 1998, which examine Parliament’s role, use empirical analysis: See AL Young, ‘Is Dialogue Working under the Human Rights Act 1998?’ [2011] Public Law 773; A Sathanapaly, *Beyond Disagreement* (OUP 2012); J King, ‘Parliament’s Role Following s 4 Declarations of Incompatibility’ in M Hunt, H Hooper and P Yowell (eds), *Parliaments and Human Rights* (Hart 2015).

⁸⁷ M Russell, M Benton, D Gover and K Wollter, ‘A Measurable Difference: Assessing the Westminster Parliament’s Impact on Government Legislation, 2005-2010’ (European Consortium of Political Research parliaments and legislatures conference, 24-27 June 2012 Dublin) 3.

⁸⁸ J Waldron, *Law and Disagreement* (OUP 1999) 29-30.

⁸⁹ A Sathanapaly, *Beyond Disagreement* (OUP 2012) 53.

Griffith's *Parliamentary Scrutiny of Government Bills* was the first major study of legislative scrutiny in the United Kingdom. Although, Griffith was a public lawyer, this work is recognised to be contribution to political science.⁹⁰ It examines three parliamentary sessions: 1967-68, 1968-69 and 1970-71.⁹¹ Griffith's principal motivation for the research was the lack of accurate information on the nature of the impact of legislative scrutiny.⁹² Griffith's methods were designed to look beyond the formal measures of impact. Griffith looked at the 'quality as well as the quantity of the impact of the Houses'.⁹³ This required a qualitative analysis of the importance of individual amendments. This creates difficulties 'as there is no alternative to using general words to describe the greater or less importance of particular judgements'.⁹⁴

One of the most significant results of Griffith's approach to the study of legislative scrutiny was that he identified that many Government amendments responded to arguments made earlier in the debate by parliamentarians outside of Government.⁹⁵ This meant that the well known fact that a very high percentage of Government amendments are successful, and that a very small percentage of non-Government amendments are agreed, does not paint a complete picture of the influence of legislative scrutiny of Government Bills.⁹⁶ This is crucial to

⁹⁰ G Webber, 'Parliament and the management of conflict' [2014] Public Law 101, 101; J McElDowney 'J.A.G. Griffith: parliament and legislation' [2014] Public Law 85, 98.

⁹¹ JAG Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin 1974).

⁹² Griffith, *Parliamentary Scrutiny of Government Bills* (n 91) 13.

⁹³ Griffith, *Parliamentary Scrutiny of Government Bills* (n 91) 14.

⁹⁴ Ibid.

⁹⁵ Griffith, *Parliamentary Scrutiny of Government Bills* (n 91) 206.

⁹⁶ This is true in many legislatures see D Olson, *Democratic Legislative Institutions: A Comparative View* (ME Sharpe 1994) 84.

understanding the nature of the United Kingdom's legislative process. Assessment of legislative scrutiny requires comprehensive analysis of every stage of the parliamentary passage of a Bill in order to identify the connections between Government amendments and legislative scrutiny from outside Government. This formed a crucial part of Griffith's methodology.⁹⁷ It also adds further subjectivity to the process of identification, as it is not always clear cut that a Government amendment is a direct response to non-Governmental arguments or amendments, especially, as the Government amendment can represent a compromise or it may be difficult to identify the source of the original argument from within the debate on the Bill. His overall conclusion is that parliamentary scrutiny does make a significant impact on legislation. But at the same time he recognised that the Government accepts change on its own terms or on the rare occasions 'when opposition to some part of their proposals is strong and widespread'.⁹⁸ The study's contribution to legislative studies in the UK is hard to exaggerate, and it contains key lessons for my own study. The primary lesson is that tracking the development of specific arguments within the scrutiny of the Bill, which progresses across the different stages of the process and can end with a Government amendment, is a key method for studying the legislative process in the United Kingdom.

Meg Russell has conducted research on the UK legislative process that explicitly aims to build on the example set by Griffith.⁹⁹ In a 2007 paper Russell and Johns

⁹⁷ Griffith, *Parliamentary Scrutiny of Government Bills* (n 91) 3.

⁹⁸ Griffith, *Parliamentary Scrutiny of Government Bills* (n 91) 256.

⁹⁹ M Russell and J Johns, 'Bicameral Parliamentary Scrutiny of Government Bills: A Case Study of the Identity Cards Bill' (2007 Political Studies Association Conference, University of Bath) 2.

develop an even more sophisticated version of Griffith's methods and apply them to the legislative scrutiny of the Identity Cards Bill. They explain that their focus is on uncovering 'Where in parliament the influence lay, and how the different actors in the legislative process interacted. That is, why and how did legislative change happen?'¹⁰⁰ The study has three stated aims: to identify the number of amendments which were the result of non-Government forces, to reveal how the chambers interacted in achieving alteration of the Bill and to detail the coordination between the party groups and backbenchers.¹⁰¹ The paper sets out nine hypotheses each of which is designed to test these dynamics.

Russell and Johns use a process of coding amendments in order to test these hypotheses. The paper analyses each of the 859 amendments to the Bill, and then codes each of them into 'policy strands'.¹⁰² The basic idea is to group together amendments which occur at different stages of the legislative process. This enables the tracking of amendments which are eventually accepted, in some form by Government and turned into Government amendments. It enables Russell and Johns to classify the outcome of all the amendments tabled to the Bill. The methods used to strand are fairly complex, and for two amendments to form part of the same strand, they have to share the same effect and address the same provision within the Bill.¹⁰³ The process revealed that 66.5 % (349) of the amendments were raised at only one stage in the legislative process, and 176 passed through more than one stage, and one was considered in 14 separate

¹⁰⁰ Russell and Johns (n 99) 4.

¹⁰¹ Ibid.

¹⁰² Russell and Johns (n 99) 2.

¹⁰³ Russell and Johns (n 99) 7.

stages.¹⁰⁴ Another important method for the project was to classify the amendments according to their importance, as either: typographical, detail/clarification and substantive.¹⁰⁵ These methods produced data that proved effective for testing their hypotheses, for example, they were able to show a significant proportion of government amendments responded to points made by backbenchers or opposition members earlier in debate.¹⁰⁶ These methods are an effective way of tracing the origins of legislative amendments and for tracking the development of legislative scrutiny.

Thompson's study of the much maligned public bill committees in the House of Commons uses a similar approach to Russell and Griffith.¹⁰⁷ Her study found that today's public bill committees 'are perhaps more negligible than before'.¹⁰⁸ These empirical methods are now an established part of political science in the UK.

Russell has developed these methods further in a larger study that is due to report in 2014. That study examines six Bills from the 2005 and the 2010 Parliaments respectively. It represents the most significant research project on legislative scrutiny in the United Kingdom since Griffith's classic book was published in 1974. In two conference papers published in 2012, Russell and her co-authors explained how they developed the approach used in the ID Cards paper for this

¹⁰⁴ Ibid.

¹⁰⁵ Russell and Johns (n 99) 6.

¹⁰⁶ Russell and Johns (n 99) 8-9.

¹⁰⁷ L Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' 66 (2012) Parliamentary Affairs 459.

¹⁰⁸ Thompson (n 107) 477.

project.¹⁰⁹ Russell explains that this project is intended to test the general perception that Parliament ‘plays little role in policy-making’.¹¹⁰ One of the interim papers from the project sets out a number of the methodological challenges that arise from assessing the influence of legislative scrutiny:

The answers remain elusive, due in large part to the methodological and design challenges that they present. The potential number of independent variables is huge (ranging from formal institutional structures and rules, to party systems and cultures, or the nature of the particular policy under scrutiny), while the dependent variable is difficult to define. It is not even clear that we know how to recognise an influential legislature when we see one.¹¹¹

Russell recognises that the assessment of legislative impact is often too simplistic.¹¹² Part of the problem is the reliance on the language of strength, weakness, impact and influence. Indeed this is one of the strengths of a narrative approach to case studies, which can capture the nuance of the substance of the legislative debate, in part because it does not rely on this language, and recognises the uniqueness of each Bill.

¹⁰⁹ M Russell, M Benton, D Gover and K Wollter, ‘A Measurable Difference: Assessing the Westminster Parliament’s Impact on Government Legislation, 2005-2010’ (European Consortium of Political Research parliaments and legislatures conference, 24-27 June 2012); M Russell, M Benton, D Gover and K Wollter ‘A Parliament That Bows and Scrapes’?: The Westminster parliament’s impact on government legislation 2005-2010’ (Political Studies Association conference, 3-5 April 2012, Belfast)

¹¹⁰ M Russell, M Benton, D Gover and K Wollter, ‘A Measurable Difference: Assessing the Westminster Parliament’s Impact on Government Legislation, 2005-2010’ (European Consortium of Political Research parliaments and legislatures conference, 24-27 June 2012) 2.

¹¹¹ Ibid.

¹¹² M Russell and M Benton, ‘Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches’ (Paper for PSA Legislative Studies Specialist Group Conference, 24 June 2009, UCL) 3-7.

The political science approach to studying the British legislative process contains two key lessons for my own approach. The first is that the influence of legislative scrutiny within the legislative process should not be judged on the number of successful non-Government amendments. This confirms the point that the evaluation of legislative deliberation on a particular Bill requires analysis of all of the stages of the process. The essential point is that lines of argument and amendments develop across the stages of the legislative process. The second point is that the principle of ‘stranding’ parliamentary debate is a valuable way of identifying how legislative deliberation on particular points develops over the course of the parliamentary stages on a Bill.

2.3 Methods and parliamentary constitutional interpretation

This section sets out the methods used to analyse the practice of parliamentary constitutional interpretation in the parliamentary session of 2010-2012. One key lesson from the review of other studies of the legislative process in Parliament is that it is vital to explain how the methods chosen correspond to the research goals and to acknowledge the limitations of the methods used. The overall research aim was to identify the value and features of parliamentary constitutional interpretation. This translated into three specific research aims for the empirical analysis of the primary material. Firstly, to document and analyse examples of the practice. Secondly, to evaluate the normative basis of the examples analysed. Thirdly, to determine the contribution that the practice made to the legislative process and to the constitution.

2.3.1 The case study method

The basic method used for the empirical analysis was to carry out three case studies of individual Bills. Each study uses a narrative account of the process to analyse the specific debates that contain the most prominent examples of parliamentary constitutional interpretation. Each case study focuses on these specific lines of debate, and employs an evaluative framework to highlight the role played by constitutional interpretation within the parliamentary process. This means highlighting the role of reports, contributions to debate and amendments moved, and attempting to demonstrate the connections between these forms of parliamentary activity and the use of constitutional interpretation.

The case study method is suited to my research aims for two reasons. The first is that it allows for in-depth analysis of the debate on each of the Bills selected. Each case study contributes to the account of the main features of parliamentary constitutional interpretation, but each study also has its own independent value as a piece of research into the passage of that particular Bill.¹¹³ The approach is intended to link the analysis of the role of constitutional interpretation to the content of the Bill itself. The second is that the case study approach suits the ‘normative’ focus of this thesis. The aim is not to try to measure the influence of the practice, nor is to quantify how prevalent it is over a particular period. Instead the aim is to present an accurate depiction of how the practice operates within the legislative process which can then be used to identify its main characteristics and its value. The aim is not to make deterministic conclusions as to the strength and influence of the practice, but instead to gain understanding of the internal

¹¹³ R Gomm, M Hammersley and P Foster, ‘Case Study and Generalisation’ in R Gomm, M Hammersley and P Foster (eds), *Case Study Method* (Sage 2000) 99.

mechanics of the process and how it can contribute to debate on the constitutional effect of a Bill. It is this basic evaluation of how the practice works which forms the basis of the analysis of why it is valuable, which is not necessarily related to its influence upon the Government. It is important to acknowledge that the case study approach does limit the strength of the generalisations drawn from the case studies.

2.3.2 Case selection

The case selection was narrowed to the first parliamentary session of the 2010 Parliament. The 2010-2012 was nearly two years long, whereas most parliamentary sessions are normally around only one year. One reason for choosing to focus on this particular session was to provide an in-depth contemporary account of the practice. Further, the 2010-2012 is also notable for being the first session of the first peacetime coalition Government since 1932. The most important reason was that the Coalition's legislative programme for the session contained a number of important constitutional Bills. There were forty-one Government Bills which received Royal Assent in the 2010-2012 parliamentary session, excluding the standard supply Bills, which are not scrutinised in the Lords. The first task was to work out which of these Bills might contain examples of parliamentary constitutional interpretation. As chapter 1 explained, the aim was to focus on the interpretation of constitutional norms other than human rights, and on this basis I decided to narrow the range of Bills to those that generated a report from the Constitution Committee. The Committee reported on twelve Bills, which are detailed in the table below.

The only other ‘official’ parliamentary basis for determining which Bills have constitutional content, the convention within Parliament that Bills of first class constitutional significance should receive their committee stage in the House of Commons on the floor of the House,¹¹⁴ was not adequate for my purposes. The problem is that some Bills which have significant constitutional content are not considered to be of first class constitutional importance. Hazell observes that the designation of the Bill as constitutional, and therefore worthy of having its committee stage on the floor of the Commons ‘is decided only in part by reference to a set of principled criteria, because the decision is made by the business managers in the House of Commons’.¹¹⁵ Even though it does not provide a basis for selection, the table below highlights those which did fall within the convention.

Table 1: Bills reported on by the Constitution Committee in 2010-12 session

Bill	Purpose	HLCC
1. Terrorist Asset-Freezing etc. Bill	To put the terrorist asset-freezing regime on a permanent statutory footing.	The Bill raises a range of important constitutional concerns. These relate to the rule of law, to the principle of legal certainty, to the principle of effective parliamentary scrutiny, to the powers and responsibilities of the courts of law, and to the legal balance between executive powers and civil liberties. (Date report published: 21/07/2010)
2. The Public Bodies Bill [HL]	To allow the Government to reform public bodies through secondary legislation.	The use of Henry VIII clauses in the Bill was problematic. It did not pass the tests of constitutional propriety. (3/11/2010)

¹¹⁴ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 566.

¹¹⁵ Hazell (n 34) 20.

3. Parliamentary Voting Systems and Constituencies Bill (First Class Constitutional Importance)	To provide for a referendum on the voting system for parliamentary elections; to provide for parliamentary elections to be held under the alternative vote ("AV") system if a majority of those voting in the referendum are in favour of that; and to reduce the number of parliamentary constituencies in the UK from 650 to 600	Lack of pre-legislative scrutiny and criticism of the proposal to reduce the size of the Commons. (10/11/2010)
4. Fixed-term Parliaments Bill (First Class Constitutional Importance)	To provide for fixed days for polls for parliamentary general elections.	Concern over the approach to the Bill and the case for the change. (16/12/2010)
5. The European Union Bill (First Class Constitutional Importance)	To change the way in which the UK gives its agreement to specified EU decisions and Treaty changes; to underwrite the doctrine of parliamentary sovereignty in the EU context; and to allow for an adjustment of seats in the European Parliament.	Concern over the complexity of the referendum locks, concern over the expansion of the use of referendums beyond fundamental constitutional matters, explains that the Bill does not change parliamentary sovereignty. (16/03/2011)
6. Police Reform and Social Responsibility Bill	To reform oversight and management of policing in the UK	From a constitutional perspective, the chief risk with Part 1 is that of politicising operational decision-making. (4/05/2011)
7. The Police (Detention and Bail) Bill	To "reverse" the effect of a High Court judgment dated 19 May 2011 but published only on 17 June: namely, R (Chief Constable of Greater Manchester Police) v Salford Magistrates' Court and Hookway.	Expresses concern over the highly unusual circumstances of the Bill. The Bill raises issues of constitutional principle as regards both the separation of powers and the rule of law. Concern over the lack of time to consider the Bill. (6/07/2011).
8. The Scotland Bill (First Class Constitutional Importance)	To confer new competences on the Scottish Parliament, re-reserve some powers to the United Kingdom, conferring new powers on the Scottish Ministers, and to make considerable reforms to fiscal matters and to public finance in Scotland.	Nothing of constitutional concern, analysis designed to inform debate (13/07/2011)

9. The Terrorism Prevention and Investigation Measures Bill	Gives effect to the recommendation of the Government's Review of Counter-Terrorism and Security Powers, published on 26 January 2011, that the current system of control orders should be repealed and replaced with a system of less restrictive and more focused "terrorism prevention and investigation measures", or "TPIMs".	Sets out a number of concerns with the "terrorism prevention and investigation measures" regime, namely its effectiveness, whether or not it should be permanent, and that enhanced judicial review should be referred to in the Bill and the context of the Draft Detention of Terrorist Suspects (Temporary Extension) Bills. (14/09/2011)
10. The Health and Social Care Bill	To implement a number of reforms to the National Health Service	Questions the desirability of the proposed change to the constitutional and legal responsibility of the Secretary of State for Health for the NHS (14/09/2011).
11. The Protection of Freedoms Bill	To repeal or reform measures which the Government considers unduly restrictive of individual liberty or which interfere disproportionately with individual rights.	Expresses concern over the wide-ranging Henry VIII clause in clause 41(3). (2/11/2011)
12. Legal Aid, Sentencing and Punishment of Offenders Bill	To reform the justice system by making changes to legal aid, litigation costs, sentencing and the rehabilitation and punishment of offenders.	Explains a number of concerns relating to the restrictions that the Bill would impose on the right of access to justice. (16/11/2011)

Three case studies were chosen to reflect both the range of constitutional issues raised within the above Bills and a number of different approaches to parliamentary scrutiny. None of the Bills selected were subject to pre-legislative scrutiny. The following Bills were chosen for the three case studies:

- The Public Bodies Bill was introduced to the House of Lords, which is relatively rare for a controversial Bill. Of the Bills reported on by the Constitution Committee in this long session, only two were introduced to the House of Lords first, the other being the Terrorist Asset-Freezing etc. Bill. The Bill was chosen because of the focus on the issue of Henry VIII clauses, and the scale of the debate on constitutional issues in the Lords.

There were four committee reports on the Henry VIII powers in the Bill, and a number of amendments were made to the Bill to respond to the constitutional objections raised in the Lords.

- The Health and Social Care Bill was chosen because it did not represent a typical constitutional Bill but nonetheless provoked a surprising amount of constitutional interpretation. The Bill proposed to change the way that existing statutes regulated the accountability of the Secretary of State for Health and this change prompted a significant amount of debate in both Houses of Parliament. The Constitution Committee played a particularly prominent role in the debate in the Lords.
- The Fixed-term Parliaments Bill was chosen because unlike the other two Bills selected, it was a clear example of a constitutional reform Bill. It received its committee stage on the floor of the House of Commons. Despite being a short Bill, its handful of clauses raised a number of important constitutional questions that were subject to extensive debate in both Houses, albeit without the benefit of pre-legislative scrutiny.

2.3.3 Analysing the parliamentary process

Each case study addresses three main research questions. Firstly, what were the main examples of the practice during the debate on the Bill? Secondly, what were the normative components of the practice identified within the debate on the Bill? Thirdly, how did the practice contribute to the legislative process within Parliament and to the constitution? These three questions informed the methods used to analyse the primary materials in each of the case studies.

The first step of the process was to acquire all the relevant materials. This meant all the publicly available Bill documents, the relevant pages of *Hansard*, and all the relevant committee reports. These materials are all available on the Parliament website,¹¹⁶ on which each Bill has a page which contains all the links to relevant pages of *Hansard* and every Bill document, including amendments papers, the different versions of the Bill, the official explanatory notes and relevant committee reports. I then conducted a sift through this material to identify which clauses within the Bill provoked significant examples of parliamentary constitutional interpretation.

Once the clauses within the Bill that prompted the most significant examples of parliamentary constitutional interpretation were identified, I focused attention on all of the parliamentary debates on those particular clauses. I then attempted to identify the role that the practice played within those debates. Griffith's and Russell's approach show that it is important to track how the debate develops across different stages of parliamentary process in order to evaluate a contribution to the parliamentary debate on a particular element of a Bill. So, for example, in order to appreciate the influence of a Constitution Committee report on a Bill that uses parliamentary constitutional interpretation to analyse a particular clause, it was necessary to follow the debate on that particular clause through every stage of the parliamentary process. It is important to recognise the limitations of this form of analysis. The reliance upon primary material and the absence of interviews or inside knowledge of the process makes it very difficult to establish causal claims. Establishing causal connections was not my primary

¹¹⁶ <<http://www.parliament.uk>> last accessed 18 July 2014.

aim; accordingly I remained cautious about making claims that were not confirmed by the participants in the primary material. Once all the relevant material was identified, it was then a question of presenting it in a way that facilitated critical evaluation of the practice and addressed my research questions.

The following approach was used to analyse the examples of the practice within each case study. The first part of each study provides an analysis of the constitutional framework of the Bill in the form it was introduced to Parliament. This part is designed to provide normative context and facilitate the qualitative analysis of the interpretation of the relevant norms in the debate. A key research aim is to identify how the normative elements of the parliamentary constitutional interpretation affect the way that the practice contributes to the debate on the Bill. The analysis of key constitutional elements of the Bill in the form it was introduced highlights how the constitutional analysis engaged with the normative elements of the Bill's constitutional framework.

The second part of each study critically analyses the examples of parliamentary constitutional interpretation within the debate on each Bill. The critical analysis in the second part of each case study does three things. It highlights the main examples of the practice in the debate; it unpicks the normative ingredients of the most prominent examples of the practice in order to show how the constitutional analysis of the Bill was constructed; and it aims to show how the constitutional interpretation contributed to the passage of the Bill in question and to the constitution. In order to focus on these three aims, the analysis of the debate is divided into individual strands of debate. These show how the debate of each of

the elements of a Bill that provoked constitutional interpretation developed. Each debate covered includes analysis of all the forms of parliamentary activity that are relevant to assessing the role of the practice. The aim of the analysis is not to highlight each and every example of the practice, but rather to present an accurate account of the role that constitutional interpretation played in the major debates on the constitutional issues within each Bill during the legislative process within Parliament.

2.3.4 The methods used in the second part of the thesis

The second part of this thesis, Chapters 6, 7 and 8, uses the empirical analysis of parliamentary constitutional interpretation to build an account of its value to both the legislative process and to the constitution. Chapter 6 generalises from the case studies in order to set out the basic features of the practice. In order to identify the value and character of the practice, the analysis combines the analysis from the case studies with a review of the relevant literature. Chapter 7 engages directly with a narrower range of literature on constitutionalism. It seeks to place the analysis of the value and character of parliamentary constitutional interpretation within a wider theoretical framework. Chapter 8 examines a number of practical changes that could be made to the legislative process to enhance the role of parliamentary constitutional interpretation within the legislative process. For this chapter the reports of parliamentary committees and think tanks were particularly helpful. For the literature review a combination of online and physical searches was used. An initial search at the beginning of the project was used to refine the research questions, and the analysis of literature was regularly updated until submission.

3. The Public Bodies Bill

I urge this House to say that the means that has been adopted is constitutionally wrong so far as the partnership between the legislature and the judiciary that we value so much in this country.¹

Lord Woolf²

This chapter is the first of three case studies, each of which seeks to critically analyse the parliamentary constitutional interpretation that occurred during Parliament's deliberations on a Government Bill during the exceptionally long parliamentary session of 2010-2012.

The Public Bodies Bill [HL] was introduced to the Lords on 28 October 2010. The Bill used Henry VIII powers to, in effect, transfer a significant amount of legislative power from Parliament to the Government.³ As the quotation above from Lord Woolf indicates, the Bill departed from what certain peers considered to be constitutionally acceptable. The content of the Bill prompted a number of parliamentarians to engage in constitutional interpretation to communicate their position on the Bill. The aims of this chapter are threefold: to identify the main examples of the practice during the debate on the Bill; to analyse the normative components of those examples; and to evaluate the nature of the contribution that the practice made to the parliamentary process and to the constitution.

¹ HL Deb 9 November 2010, vol 722, col 77.

² Peer (Crossbench), former Lord Chief Justice, former Master of the Rolls and former member of the Constitution Committee.

³ For a definition see 3.1.1.

The Bill prompted reports from both the Constitution Committee and the DPRRC. The interpretation and application of normative standards by each of these committees played a central role in the House of Lords' deliberations. The passage of the Bill through the Lords highlights how these committees have increased Parliament's capacity to engage in constitutional interpretation. The arguments made by both of these committees in their reports permeated throughout the debate in the Lords, and one of the aims of this chapter is to show how these arguments were used and developed over the stages of the parliamentary process.

The main part of the chapter is divided into two sections. The first section sets out the constitutional framework of the Bill. The second section describes how parliamentarians interpreted that framework during the debate on the Bill.

3.1 The constitutional framework of the Bill

The Public Bodies Bill was not a first class constitutional Bill. It did not contain any new constitutional laws, nor did it seek to repeal any of significance. However, a number of parliamentarians argued that the Bill pushed at the boundaries of constitutional acceptability. This section provides some context to the debate on the constitutional effect of the Bill by setting out the basic normative architecture. It explains the basic structure of the Bill as introduced, and provides an analysis of the constitutional norms relevant to the Bill.

The origins of the Bill lay within the Conservative Party's manifesto for the 2010 General Election, which contained the following pledge:

Any quangos that do not perform a technical function or a function that requires political impartiality, or act independently to establish facts, will be abolished.⁴

After the election the Coalition Government announced that it would review all public bodies. The review concluded that changes should be made to 481 bodies.⁵ Many of the public bodies that the Coalition Government wished to abolish or merge with other bodies or modify were created by statute, and therefore legislation was needed to give effect to the policy. The Bill was designed to enable changes to bodies created by primary legislation, but rather than simply draft a Bill which made the specific changes arising from the review, the Government opted to draft a new procedure for public body reform.

The aim of the Government's policy was to reduce the number of public bodies in order to increase accountability and to cut costs.⁶ This policy did not appear to raise any obvious constitutional issues. However, the Bill aimed to give departments the powers to execute the policy quickly and efficiently. The Bill's Impact Assessment stated its aims to be 'saving time on the floor of the House' and 'to allow departments to affect the changes

⁴ Conservative Party Manifesto (2010) 70.

⁵ The Cabinet Office, *Public Bodies Reform – Proposals for Change* (2010).

⁶ The Cabinet Office, *Public Bodies Bill Impact Assessment* (2010) 1.

they need'.⁷ The problem was that the aims of the Bill, as opposed to the policy itself, did raise significant constitutional issues.

3.1.1 The Bill as introduced to the House of Lords

The Public Bodies Bill sought to create a way for the Government to make changes to primary legislation without having to use the standard parliamentary procedure for making Acts of Parliament.⁸ The Bill created a truncated procedure, which would allow the Government to change the primary legislation relating to public bodies by order. This form of delegated power is known as a 'Henry VIII power'.⁹ For some, Henry VIII powers are problematic because they allow the Government to circumvent the normal democratic process.¹⁰

In the form it was introduced to the House of Lords, the Bill contained seven order-making powers in seven clauses, each linked to a schedule, and each clause gave the Minister a particular type of power over each of the bodies contained in the corresponding schedule.¹¹ Clause 1 was a power to abolish any body in schedule 1, clause 2 was a power to merge bodies in schedule 2, clause 3 was a power to modify the constitutional arrangements of a body listed in schedule 3, clause 4 allowed for a modification of funding arrangements of a body listed in schedule 4, clause 5 created the

⁷ Ibid.

⁸ The Public Bodies HL Bill (2010-12) 25.

⁹ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis London 2011) 667.

¹⁰ N Barber and A Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' [2003] *Public Law* 112, 113.

¹¹ The Public Bodies HL Bill (2010-12) 25.

power to modify or transfer functions of bodies contained in schedule 5, and clause 6 allowed a Minister to authorise the delegation of functions from a public body listed in schedule 6 to an eligible person.¹²

Without doubt the most constitutionally controversial power of them all was clause 11. It gave the Minister the power to add any body listed in schedule 7, of which there were 150, to any of the other schedules in the Bill. Schedule 7 included ‘bodies and offices where there is no policy intention to make changes to their status and functions’.¹³ Clauses 1-6 and 11 were all in effect Henry VIII clauses, in that many of the bodies included in each of the schedules were created by primary legislation and therefore the order-making powers enabled the Minister to alter primary legislation through secondary legislation.

Clause 8 contained the main legal constraints on the order-making powers within the Bill. It stated that when making an order a Minister must have regard to ‘increasing efficiency, effectiveness and economy in the exercise of public functions’ and ‘securing appropriate accountability to Ministers in the exercise of public functions’.¹⁴ Clause 8 also stated that a Minister could make an order only if ‘the order does not remove any necessary protection and if the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to

¹² Explanatory Notes to The Public Bodies HL Bill (2010-12) 25, para 87.

¹³ Ibid.

¹⁴ The Public Bodies HL Bill (2010-12) 25, cl 8.

exercise'.¹⁵ This was the only mandatory restriction on the Minister's discretion.

Another constitutionally significant element of the Bill was the parliamentary procedure used for orders made under the Bill. Orders made under each of the clauses in the Bill used a simple affirmative procedure.¹⁶ This procedure allows for limited parliamentary scrutiny because there is no opportunity to amend an order. The procedure only allows for the order to be either approved or rejected outright. A further difficulty with this arrangement is that it is an established practice of the House of Lords that it does not regularly vote down the Government's secondary legislation.¹⁷

3.1.2 Henry VIII powers

The norms that regulate the use of Henry VIII powers within primary legislation are complex and somewhat unclear. There is no primary legislation or soft law code to tell us when or how they can be used, and the principle of parliamentary sovereignty means that, in theory, Parliament can sanction any form of delegated legislative power. However, the theoretical legal position is misleading. In reality Parliament does regulate the way that Henry VIII powers are used. Two committees, the Constitution Committee and the DPRRC, are both responsible for policing the boundaries between primary and secondary legislation. In the course of their work both of the Committees apply a series of standards to these powers, and these standards,

¹⁵ The Public Bodies HL Bill (2010-12) 25, cl 8.

¹⁶ The Public Bodies HL Bill (2010-12) 25, cl 10 and cl 12.

¹⁷ Jack and May (n 9) 682.

in part, determine whether the nature of the Henry VIII powers within a Bill are politically acceptable.

The use of Henry VIII powers, and delegated powers more generally, is controversial. Their use is central to the debate on the balance of power between Parliament and Government in the UK. In 1929, Lord Hewart famously argued in *The New Despotism* that delegated powers were problematic:

A persistent and well contrived system, intended to produce, and in particular producing, a despotic power which ... places government departments above the sovereignty of Parliament and beyond the jurisdiction of the court.¹⁸

However, others have challenged the idea that the use of delegation legislation should be characterized in this way. The Donoughmore Committee on Ministers' Powers, which reported in 1932, said that parliamentary sovereignty was not affected by the practice because the power to legislate had been expressly given by Parliament.¹⁹ The Donoughmore Committee also noted, however, that Henry VIII powers should only be used in emergency or to bring an Act into operation.²⁰ In 1950, Griffith agreed with the Donoughmore Committee, and argued that claims about the incompatibility of the practice with parliamentary

¹⁸ Lord Hewart of Bury, *The New Despotism* (Benn, London 1929) 14.

¹⁹ The Committee on Ministers' Powers, *Report of the Committee on Ministers' Powers* (Cmd 4060, 1932) 65.

²⁰ *Ibid.*

sovereignty are based on a misconception of the principle.²¹ The principle, in his view, does not mean that Parliament is supreme over the Government. According to Griffith, Parliament does not have a ‘monopoly on power’ and therefore delegated legislation, when approved by Parliament, does not threaten the sovereignty of Parliament.²²

The debate on the constitutionality of Henry VIII powers has reared its head a number of times in the last 30 years. In 2001 Parliament enacted the Regulatory Reform Act 2001, which contained a number of Henry VIII powers. The DPRRC said that the powers within the Regulatory Reform Bill raised ‘matters of fundamental constitutional importance’.²³ The committee was concerned that the powers could have a profound effect of the legislative process:

Depending on how this power was used by successive Governments, it would be capable of bringing about a major change in the long-standing arrangements for the parliamentary consideration of legislation.²⁴

This was a problem for the committee, and they added:

We do not believe that these new powers could conceivably be acceptable to the House in principle unless there were stringent

²¹ JAG Griffith, ‘The Constitutional Significance of Delegated Legislation in England’ (1950) 48 Michigan Law Review 1079, 1083-84.

²² Ibid.

²³ Select Committee on Delegated Powers and Deregulation, *Fifteenth Report* (HL 1999-00, 61) para 28.

²⁴ Select Committee on Delegated Powers and Deregulation (n 23) para 33.

safeguards to protect against potential abuse, including a sufficient measure of Parliamentary control.²⁵

The DPRRC also recommended the introduction of a sunset provision.²⁶

These reports on the Regulatory Reform Bill show that the DPRRC assesses the appropriateness of Henry VIII powers based on the subject matter of the Bill in question, the purpose of the power and the nature of the safeguards included. The basic principle is that safeguards, both in terms of the way the power is defined and in terms of the parliamentary procedure used, should reflect the significance of the relevant power.

In 2005, the Labour Government introduced the Legislative and Regulatory Reform Bill. The Bill contained a Henry VIII power that was exceptionally wide in scope. The report of the Constitution Committee on that Bill said:

The general acceptability of delegating powers to Ministers to change the statute book is now accepted within the United Kingdom's constitutional system. The question in relation to the Bill is therefore whether Ministers should have power to change the statute book for the specific purposes provided for in the Bill and, if so, whether there are adequate procedural safeguards to ensure that Parliament has effective oversight and control over Ministers' legislative powers. The Government's original proposals for a power

²⁵ Select Committee on Delegated Powers and Deregulation (n 23) 36.

²⁶ A provision in a Bill that gives it an 'expiry date' once it is passed into law. 'Sunset clauses' are included in legislation when it is felt that Parliament should have the chance to decide on its merits again after a fixed period, Glossary Parliament website <<http://www.parliament.uk/site-information/glossary/sunset-clause>> accessed 16 July 2014; Select Committee on Delegated Powers and Deregulation, *Second Report* (HL 2000-01, 8) para 20.

to be used for “reforming legislation” clearly failed this test.²⁷

As with the DPRRC, the Constitution Committee’s ability to develop standards in its interpretation and analysis of Government Bills and to then apply those standards in their scrutiny is a major part of its contribution to the legislative process. Parliament’s scrutiny of the Legislative and Regulatory Reform Bill led to a number of amendments, which meant that the 2006 Act contained a number of significant safeguards. For example, the Act includes a complex ‘super-affirmative’ procedure for orders made under the Act, which means that amendments can be tabled to the orders, and that the committee in charge of scrutinising the order can veto the order.²⁸

Henry VIII powers are now established as a legislative option that can be used by Government in primary legislation. Parliament, through the DPRRC and the Constitution Committee, has developed principles and precedents to determine how they should be used. Interpreting these principles and precedents formed a central part of the parliamentary scrutiny of the Public Bodies Bill.

3.2 The parliamentary debate

This section identifies and critically analyses the main examples of parliamentary constitutional interpretation during the debate on the Public Bodies Bill. The aims of this section are to highlight how parliamentarians

²⁷ House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill* (HL 2005-06, 194) para 35.

²⁸ P Davis, ‘The Significance of Parliamentary Procedures in Control of the Executive: a Case Study: the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006’ [2007] Public Law 677, 687.

interpreted the norms that made up the Bill's constitutional framework, and to evaluate the contribution that the examples covered made to the passage of the Bill through Parliament. Despite the lack of codified rules governing the use of Henry VIII powers, parliamentarians used the precedent of the Legislative and Regulatory Reform Act 2006 to judge the boundaries of constitutional propriety that applied to the Public Bodies Bill.

The parliamentary journey of the Public Bodies Bill was atypical. Unlike most Bills, it was introduced to the Lords. When a Bill is introduced to the Lords, the House has a veto over the legislation because the Parliament Acts 1911 and 1949 do not apply. Although the use of the veto is unlikely, it appears that starting in the Lords increases their ability to have a major impact on a Bill. Firstly, often Bills are deliberately chosen by Government to start in the Lords, because the Government is willing to accept changes to a Bill. Secondly, when a Bill is a Lords starter, the Lords does not act as the chamber of 'sober second thought'.²⁹ When the House of Commons has already approved a Bill, the pressure is on the House of Lords to approve the Bill so that it can become law, whereas when the House of Lords operates as the first chamber, it is free from the prior judgment of the Commons and the pressure to complete the work of the Commons. In this case, the Lords dominated the debate on the constitutional effect of the Public Bodies Bill, in the sense that by the time the Bill reached the Commons, most of the main constitutional questions had led to

²⁹ J Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 Current Legal Problems 1, 8.

amendments, and the Commons showed limited interest in those that remained.

3.2.1 The Constitution Committee report

The first constitutional analysis of the scope of the Bill within Parliament came from the Constitution Committee. Its report on the Bill, published before the second reading debate in the Lords, explained in highly critical terms that the use of Henry VIII powers in the Bill was not satisfactory.³⁰ The Committee's analysis of the constitutional effect of the Bill is not an evaluation of the merits of this particular proposal, nor is it simply an informational account of what the constitutional implications of the Bill are; rather it is an analytical judgment based upon the interpretation and application of external normative standards. As such it is a significant example of the practice of parliamentary constitutional interpretation.

The critical evaluation of the Public Bodies Bill is justified by the application of a test originally used in the Committee's report on the Legislative and Regulatory Reform Bill in 2006. The 2006 report said that Henry VIII powers should be 'clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight',³¹ The report on the Public Bodies Bill concluded that the clauses within the Bill failed to meet this test.³² The strength of this conclusion is a product of the Committee's ability to interpret and apply normative standards. In the

³⁰ House of Lords Select Committee on the Constitution, *The Public Bodies Bill* (HL 2010-12, 51).

³¹ House of Lords Select Committee on the Constitution (n 30) para 5.

³² House of Lords Select Committee on the Constitution (n 30) para 9.

absence of a codified constitution, the Committee's ability to generate norms from constitutional principles is central to their ability to scrutinise the constitutional effect of the Bill. The test from the report on the earlier Bill served to fill the gap left by the absence of any codified regulation of Henry VIII powers. The Committee argued that Henry VIII powers are a 'constitutional oddity' that challenge two constitutional principles. The first is that 'only Parliament may amend or repeal primary legislation'.³³ The second is that:

It is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective.³⁴

No authority is cited to support the existence of the latter principle. The Committee explained that these two principles can only be departed from where 'a full and clear explanation and justification is provided'.³⁵ The use of constitutional norms to demand a specific level of justification from the Government is a tool frequently used by the Constitution Committee.³⁶ It is one of the strongest tools available to the Committee. It enables the Committee to say, in effect, that a particular departure from a constitutional norm is *prima facie* unconstitutional, but can be made constitutional if the Government can produce good reasons to explain why the departure from principle is necessary. It is a form of reasoning that closely resembles that

³³ House of Lords Select Committee on the Constitution (n 30) paras 4 and 6.

³⁴ House of Lords Select Committee on the Constitution (n 30) para 6.

³⁵ *Ibid.*

³⁶ See for example: House of Lords Select Committee on the Constitution, *The Civil Contingencies Bill* (HL 2003-04, 114) para 7; House of Lords Select Committee on the Constitution, *The Banking Bill* (HL 2008-09, 19) para 7.

used by the UK courts in human rights cases. For example, in *R v Ministry of Defence, Ex p Smith*, Lord Bingham said:

The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.³⁷

The proportionality test outlined by Lord Clyde in the case of *de Freitas* is also based on the idea that a departure from a valuable normative standard should only be accepted if the reasons for doing so are good enough.³⁸ The Constitution Committee used the language of proportionality to tell the Government that the norms of the constitution create expectations of both the process of law making and the substance of the law.

The report also addressed each of the main provisions within the Bill. In relation to the restrictions on the use of the power contained in clause 8, the Committee drew attention to the fact that the restrictions were drawn from the Legislative and Regulatory Reform Act 2006.³⁹ However, the 2006 Act contained more restrictions, including that the effect of the order should be proportionate to the policy objective, that the order should strike a fair balance between the public interest and interests of any person adversely affected by it, and that the order should not be of constitutional significance.⁴⁰ The Committee in effect cited the restrictions in the 2006 Act as a precedent for how the constitutional norm cited — that Henry VIII

³⁷ [1996] QB 517, 554.

³⁸ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

³⁹ House of Lords Select Committee on the Constitution (n 30) para 9.

⁴⁰ *Ibid.*

powers should be limited — should be interpreted. The report also made use of the comparison with the Legislative and Regulatory Reform Act 2006 to analyse the parliamentary procedure used in clause 10 of the Public Bodies Bill.

The 2006 Act included a super-affirmative procedure that requires the Minister to consult before laying an order, and requires the Minister to take into account any representations or resolutions made by a parliamentary committee on a draft order, which is laid for 60 days.⁴¹ The report argued that Parliament could not be completely denied the opportunity to debate changes to bodies which were established by primary legislation, and therefore a more robust parliamentary procedure, such as that used in the 2006 Act, should be included in the Bill.⁴²

The Constitution Committee's report highlights a number of features of parliamentary constitutional interpretation. The practice enabled the Constitution Committee to describe in precise terms why the constitutional effect of the Bill was problematic, both in terms of the content of the Bill and how the Government justified the substance. The constitutional interpretation explained exactly what the Government needed to do in order to bring the Bill in line with the principles of the constitution. Constitutional interpretation was used to provide a judgment on constitutionality, and the constitutional interpretation also supplied the rules themselves. In the absence of settled codified constitutional rules on Henry VIII powers, the

⁴¹ House of Lords Select Committee on the Constitution (n 30) para 7.

⁴² Ibid.

Committee was able to draw on its own reports to supply the normative basis for its judgment. The overriding value of both of these contributions is the ability to make the normative basis of the regulation of Henry VIII powers accessible and therefore relevant to the passage of this Bill.

3.2.2 Second reading in the House of Lords

Two features of the second reading debate in the House of Lords were significant for parliamentary constitutional interpretation. The first is that the Minister responsible for the Bill in the Lords, Lord Taylor of Holbeach (Conservative), indicated that the Government would be taking a constructive approach to negotiations on the Bill. For example, he said ‘this Bill was not a Lords starter by chance’.⁴³ He explained that the Government wanted to make use of the Lords’ expertise to improve the Bill. The ability of parliamentarians outside of the Government to influence the content of a Bill after it is introduced depends to a large extent on the attitude of the Government. The Government’s proactive attitude meant that the Lords would not have to rely upon defeating the Government in order to get its position across. Lord Lester of Herne Hill (Liberal Democrat) revealed in his speech that he had already met the Ministers responsible on ‘several occasions’ and that they had ‘assured him of their intention’ to improve the essential safeguards and parliamentary procedures in the Bill.⁴⁴ The attitude of Government provided a platform for those engaged in constitutional interpretation in their scrutiny of the Bill. It is also worth noting that despite

⁴³ HL Deb 9 November 2010, vol 722, col 64.

⁴⁴ HL Deb 9 November 2010, vol 722, col 99.

this positive attitude, the Government Minister did not directly acknowledge the constitutional implications of the use of Henry VIII powers in the Bill.

The second feature was the impact of the Constitution Committee's report on the debate. Of the 57 speeches made, 19 made reference to the report. Baroness Royall of Blaisdon (Labour), the Leader of the Opposition in the Lords, who made the first speech after the Government Minister, quoted extensively from the report.⁴⁵ Reading the debate, it appeared that the Lords as a Chamber endorsed the judgment of the Committee's report. Baroness Scotland of Asthal (Labour), a former Attorney General, said:

In that [the Constitution Committee's] report, members of our House of such eminence say with one voice that the Bill is wrong, that the tests are wrong, that the process is wrong... if the Minister disagrees with that analysis, could we please have the basis on which that disagreement is founded?⁴⁶

Another peer described it as 'one of the most devastating critiques of a Government Bill that I have ever seen a committee of this House deliver'.⁴⁷ The ability of peers to use and to endorse the constitutional analysis of the Constitution Committee within the debate on the floor of the Lords is central to the Committee's role within the legislative process. It demonstrates the effectiveness of the reporting function of the Committee, in that the value of their reports and the analysis within them depend on peers within the Lords using them as part of their scrutiny. The report did

⁴⁵ HL Deb 9 November 2010, vol 722, col 66.

⁴⁶ HL Deb 9 November 2010, vol 722, col 81.

⁴⁷ HL Deb 9 November 2010, vol 722, col 69.

more than just inform the debate; it supplied a non-partisan judgment on the constitutionality of the Bill, which the Lords could endorse.

The second reading debate was also notable, because each of the three elements of the Bill that provoked the most significant examples of constitutional interpretation were analysed extensively in a number of the speeches.

Schedule 7 and clause 11

Schedule 7 and clause 11 were the source of much criticism. Baroness Royall said, ‘the Government propose to station permanently the sword of Damocles, throwing their current operations and future prospects into doubt and confusion’.⁴⁸ She added that it was a power that struck ‘at the heart of parliamentary supremacy’.⁴⁹ Baroness Andrews (Liberal Democrat) was perplexed by the fact that the Government was securing powers for Ministers to legislate in the future ‘without clear purpose or intent’.⁵⁰ Lord Norton of Louth (Conservative), a current member and former chairman of the Constitution Committee, made the important point that the Government had presented a false dichotomy on the design of the Bill.⁵¹ He explained that while one Bill could make many changes to many public bodies, it did not require separate primary legislation for each public body, and therefore the scope of the Henry VIII powers in the Bill could not be justified by

⁴⁸ HL Deb 9 November 2010, vol 722, col 71.

⁴⁹ HL Deb 9 November 2010, vol 722, col 71.

⁵⁰ HL Deb 9 November 2010, vol 722, col 86.

⁵¹ HL Deb 9 November 2010, vol 722, col 153.

claiming the need to save time.⁵² This point illustrates why the Constitution Committee demanded that the Government give more justification for their design of the Bill, as their reasoning did not stack up. Lord Norton described the design of the Bill as ‘lazy’, and he pointed out that a desire to save time is not sufficient justification for appropriating significant legislative powers from Parliament.⁵³ Lord Norton recommended that schedule 7 and clause 11 be removed from the Bill.⁵⁴ Viscount Eccles (Conservative) agreed that schedule 7 should simply be dropped and suggested that a sunset clause should be inserted into the Bill in order to limit its scope, and to force the Government to propose another Public Bodies Bill when it knew what it wanted to do to the relevant public bodies.⁵⁵

Lord Woolf (Crossbench) also criticised clause 11 and schedule 7, but from a different angle. He argued against the inclusion of certain bodies in schedule 7 because of their involvement in the administration of justice and their potential impact upon judicial independence:

I have to say to the Minister that I do not believe that this Bill, in so far as it refers to the bodies that I have indicated, is consistent with the Constitutional Reform Act... As is indicated here, we are not concerned with purpose; we are concerned with means, and I urge the House to say that the means that has been adopted is

⁵² Ibid.

⁵³ HL Deb 9 November 2010, vol 722, col 154.

⁵⁴ Ibid.

⁵⁵ HL Deb 9 November 2010, vol 722, col 166.

constitutionally wrong so far as the partnership between the legislature and the judiciary that we value so much in this country.⁵⁶

The speech became a reference point in the debate, and was referred to in 23 of the speeches given.⁵⁷ Lord Woolf argued that these bodies should not have to fear that the executive could abolish or substantially change them by simply making an order.⁵⁸ The use of s 3(1) of the Constitutional Reform Act 2005 by Lord Woolf is noteworthy.⁵⁹ S 3(1) provides that the Lord Chancellor and other Ministers with responsibility for the administration of justice ‘must uphold the continued independence of the judiciary’. It shows that statutory provisions that are designed to protect constitutional norms can be used by parliamentarians engaged in the analysis of the constitutional effect of a Bill. In the absence of a codified constitution, an appeal to a provision in a statute is an important tool of constitutional interpretation, in that it provides more traction than a reference to judicial independence or the rule of law in general terms.

The scope of the power

A number of peers argued that the existing restrictions on the powers in the Bill, set out in clause 8, were inadequate. Baroness Andrews stated:

I have absolutely no confidence in the ability of loose terms such as freedom and efficiency to protect vital bodies and their functions,

⁵⁶ HL Deb 9 November 2010, vol 722, cols 75-77.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid; the same point was made by Lord Hunt of Kings Heath (Labour) HL Deb 9 November 2010, vol 722, col 181.

especially when the rest of the protections offered in the legislative reform orders legislation has been left out of the Bill.⁶⁰

Lord Lester also argued that the Bill did not have adequate safeguards against the misuse of Ministers' delegated powers. He engaged in close textual analysis of the statutory safeguards, highlighting the limitations of clause 8(2) which only operates 'if the minister considers' the matters in clause 8(2)(a) and (b).⁶¹ He questioned why the Bill did not include a provision that would restrict the use of the order-making powers to certain limited purposes.⁶² Lord Crickhowell (Conservative), a member of the Constitution Committee, explained that he and others in the Committee had met the Ministers and Bill team responsible for the Bill, and that he was troubled by their reference to 'safeguards' because the words 'the Minister must have regard to' and 'if the Minister considers' do not 'provide any kind of reassurance'.⁶³ Lord Norton compared the restrictions with those in the Legislative and Regulatory Reform Act 2006, and expressed surprise that the Government had not included the same restrictions that were included in that Act.⁶⁴ He noted the 2006 Act included a number of additional legal restrictions on the way in which the order-making powers could be used, including for example a limit on using the powers for 'constitutionally significant' legislation.⁶⁵ The use of existing legislation, in the form of the 2006 Act, was again central to the parliamentary analysis of the constitutional effect of the Bill.

⁶⁰ HL Deb 9 November 2010, vol 722, cols 86-87.

⁶¹ HL Deb 9 November 2010, vol 722, col 99.

⁶² Ibid.

⁶³ HL Deb 9 November 2010, vol 722, col 135.

⁶⁴ HL Deb 9 November 2010, vol 722, col 154.

⁶⁵ Ibid.

Parliamentary procedure

The other major focus for constitutional analysis was the design of the parliamentary procedure for agreeing an order. The general consensus was that the procedure did not allow for effective parliamentary oversight or scrutiny of orders made under the Bill. Lord Freeman (Conservative) described the process as a ‘procedural inevitability’.⁶⁶ Baroness Royall explained that orders made under Bill might force the Lords to depart from the convention that the Lords do not reject statutory instruments.⁶⁷ She explained that the skeleton nature of the Bill meant that the orders would be treated as exceptional and this was enough to justify departing from the convention.⁶⁸ Lord Mayhew of Twysden (Conservative), a member of the Delegated Powers and Regulatory Reform Committee, was the first to say that the Bill should contain a super-affirmative resolution procedure, the procedure used in the Legislative and Regulatory Reform Act 2006.⁶⁹ That process would require the Minister to take into account consultation after laying an order, and require the minister to take into account the view of parliamentary committees before he could come back with an order.⁷⁰ Lord Crickhowell also recommended following the example of the Legislative and Regulatory Act 2006, which he explained requires ‘Ministers to take account of any representations, any resolution of either House and any recommendations of a parliamentary committee in respect of a draft order,

⁶⁶ HL Deb 9 November 2010, vol 722, col 84.

⁶⁷ HL Deb 9 November 2010, vol 722, col 71.

⁶⁸ Ibid.

⁶⁹ HL Deb 9 November 2010, vol 722, col 96.

⁷⁰ Ibid.

laid for 60 days'.⁷¹ He also recommended that a provision requiring consultation and explanation of an order in an accompanying explanatory note should also be considered.⁷² Lord Roberts of Conwy (Conservative) explained the problem with the affirmative procedure: 'orders cannot be amended in either house, are subject to time-limited debates and it is not our practice, in the house, to vote on them'.⁷³ Lord Norton also supported the use of the super-affirmative procedure instead of a simple affirmative procedure.⁷⁴ Again the precedent of the 2006 Act was instrumental. A distinctive feature of parliamentary constitutional interpretation is that parliamentarians can bring their knowledge, experience and institutional perspective afforded by legislative scrutiny to their analysis of the substance of a Bill that relates directly to Parliament. This parliamentary focus is a vital element of the practice.

Read together, the second reading debate and the Constitution Committee's report represent a detailed constitutional critique of the Bill's constitutional effect. Peers set out a number of critiques on how the Bill challenged the existing delicate dynamics of a number of relationships in the constitution. The sections below track the debates and assess the role of constitutional interpretation on each of three constitutional issues debated at second reading: clause 11 and schedule 7, the scope of the power, and the parliamentary procedure.

⁷¹ HL Deb 9 November 2010, vol 722, col 136.

⁷² Ibid.

⁷³ HL Deb 9 November 2010, vol 722, col 147.

⁷⁴ HL Deb 9 November 2010, vol 722, col 154.

3.2.3 Clause 11 and schedule 7

In its first report on the Bill, the DPRRC labelled the clause 11 power ‘inappropriate’ and ‘unacceptable’.⁷⁵ The report explained that it would have enabled a Minister to, for example, appropriate the functions of the Judicial Appointments Commission, and therefore alter the impact of the Constitutional Reform Act 2005, through secondary legislation.⁷⁶ The report also pointed out that the power did not make any allowance for the different statutory functions of each of the bodies listed, whether they performed judicial, legislative or executive functions.⁷⁷ The DPRRC suggested that the best option to solve the problems caused by clause 11 was to remove some of the power from the Bill altogether.⁷⁸ In their second report on the Bill they reiterated that clause 11 and schedule 7 should be removed from the Bill.⁷⁹

On the seventh day of Committee, the Government Minister began the debate by offering an update on the ‘work that has taken place since the Committee last met to improve this Bill’.⁸⁰ He announced that schedule 7 and clause 11 would be dropped from the Bill. It is difficult to exaggerate the significance of this change in the context of the Bill. The Minister explained: ‘the Government have accepted the arguments that bodies and offices should be listed in the schedules of this Bill only where Parliament

⁷⁵ The Delegated Powers and Regulatory Reform Committee, *The Public Bodies Bill* (HL 2010-12, 57) para 1.

⁷⁶ The Delegated Powers and Regulatory Reform Committee (n 75) para 23.

⁷⁷ The Delegated Powers and Regulatory Reform Committee (n 75) para 5.

⁷⁸ The Delegated Powers and Regulatory Reform Committee (n 75) para 36.

⁷⁹ The Delegated Powers and Regulatory Reform Committee, *The Public Bodies Bill* (HL 2010-12, 62) para 4.

⁸⁰ HL Deb 28 February 2011, vol 725, col 798.

has given its consent in primary legislation'.⁸¹ He added his name to the amendment led by Lord Norton to delete schedule 7.⁸² This intervention represented a major victory for the Constitution Committee, the DPRRC, Lord Woolf and all those who opposed schedule 7 and clause 11. The Lords used constitutional norms to set out a clear standard, that it is not acceptable to create Henry VIII powers on a 'just in case' basis without a compelling argument for doing so. Their ability to articulate why the Bill departed from constitutional norms was central to this change, which dramatically altered the nature of this Bill, challenging the idea that Parliament does not make a significant impact on the content of legislation. The change is likely to serve to inform future Governments contemplating trying to use Henry VIII powers.

3.2.4 The scope of the power

A number of parliamentary actors indicated that in order to make the Henry VIII powers conform to the norms of the constitution, the scope of the powers would need to be limited or 'ring fenced'. The DPRRC argued that a change to the parliamentary procedure could not 'on its own, bring a misconceived delegated power within the bounds of acceptability'.⁸³ The broad nature of the powers meant that further amendments were required to effectively specify and limit the purposes for which the powers could be used.⁸⁴ After second reading, peers demonstrated their ability to use a

⁸¹ HL Deb 28 February 2011, vol 725, col 799.

⁸² M Russell, *The Contemporary House of Lords* (OUP 2013) 188-189.

⁸³ The Delegated Powers and Regulatory Reform Committee (n 79) para 3.

⁸⁴ The Delegated Powers and Regulatory Reform Committee (n 79) para 4.

normative standard to devise practical legislative solutions to improve the Bill, and a number of limitations were added.

Restrictions on the use of the power

The first amendment considered in the committee stage in the Lords was designed to restrict the scope of the powers in the Bill. Lord Lester, the co-author of the amendment, (the other being Lord Pannick (Crossbench)), explained that his proposed amendments would make the relevant Ministers accountable for breaches of the standards of public administration. Amendment 1 was a paving amendment for Amendment 175, which included four restrictions, on judicial independence, respect for human rights, proportionality and the independence of bodies that need to act free from ministerial interference.⁸⁵ Amendment 175 was designed to ensure that any exercise of the delegated powers in the Bill would have respect for certain constitutional principles.⁸⁶ It is a prime example of a clause designed explicitly to protect constitutional norms. Lord Campbell of Alloway (Conservative) expressed his support: ‘What he (Lord Lester) said was wholly consistent with the acknowledged function of this House to protect the constitution and to amend the Bill as it goes through’.⁸⁷ Lord Pannick also made his case for the amendment in constitutional terms, arguing that the Bill ‘confers excessive power on the executive’.⁸⁸

⁸⁵ HL Deb 23 November 2010, vol 722, col 1011.

⁸⁶ Ibid.

⁸⁷ HL Deb 23 November 2010, vol 722, col 1014.

⁸⁸ Ibid.

The authors of the amendment criticised the amendment proposed by the Government, which would only require the Minister *to consider* defined matters before exercising powers; in contrast, their own amendment would not leave it to the consideration of the Minister.⁸⁹ Lord Soley (Labour), a member of the DPRRC, explained the problem with the drafting of the Government amendment: ‘once the minister has considered, he can still go ahead and carry out actions that he was thinking of taking with or without changes’.⁹⁰ The authors argued that their amendment ‘embodies the principle of the rule of law and judicial independence that are set out in the 2005 Constitutional Reform Act’.⁹¹ This argument again highlights the significance of statutory protection of constitutional norms for parliamentary constitutional interpretation. For the authors of Amendment 1, the comparison with the Legislative and Regulatory Reform Act 2006 was also crucial. Like the DPRRC, they disagreed with the Government’s position, which was that because the scope of the Public Bodies Bill was narrower than the 2006 Act it justified weaker restrictions.

The Government responded constructively to Lord Lester and Lord Pannick’s amendment. The Minister agreed to look again at the issue of proportionality, even though he admitted he thought it was unnecessary.⁹² On the amendment’s change from a consideration to a requirement the Minister was more resolute and insisted that the Minister should have the final say on whether the necessary conditions for making an order have been

⁸⁹ HL Deb 23 November 2010, vol 722, col 1015.

⁹⁰ HL Deb 23 November 2010, vol 722, col 1020.

⁹¹ HL Deb 23 November 2010, vol 722, col 1011.

⁹² HL Deb 23 November 2010, vol 722, col 1034.

met.⁹³ The Government was left in little doubt about the strength of feeling behind the objections raised by Lords Lester and Pannick's amendment, as, even though Lord Lester wanted to withdraw the amendment following the Minister's reassurances, he was pushed by his fellow peers to put it to a vote — and the result was a defeat of the Government with 235 votes in favour of the amendment and 201 against.⁹⁴ The defeat sent a clear message that further changes were needed to make the Bill constitutionally acceptable.

On 9 March the Government amendment 175ZA was moved. The amendment was the product of negotiations between the Government and Lord Lester and Lord Pannick that had followed the Government defeat on the first day of the Committee stage.⁹⁵ It limited the use of the order-making power for bodies that conduct three types of functions: firstly, a judicial function; secondly, where the body conducts enforcement activities in relation to obligations imposed on a minister; and thirdly, where the body oversees a Minister's functions.⁹⁶ It also created a proportionality requirement.⁹⁷ The amendment was agreed without a division. The restriction clause remained weaker than the protection within the 2006 Act, but nonetheless represented a significant strengthening of the limits on the Henry VIII powers in the Bill.

⁹³ HL Deb 23 November 2010, vol 722, col 1036.

⁹⁴ HL Deb 23 November 2010, vol 722, col 1039.

⁹⁵ HL Deb 9 March 2011, vol 725, cols 1742-1743.

⁹⁶ HL Deb 9 March 2011, vol 725, cols 1743-1744.

⁹⁷ Ibid.

The purpose of the power

The DPRRC's second report on the Bill also argued that further amendments were required effectively to specify the *purposes* for which the powers could be used.⁹⁸ Their analysis of the Minister's response to their first report was particularly important. The Minister claimed: 'The powers under the 2006 Act apply at large, whereas the powers under the Bill can only be exercised in relation to the bodies specified in it'.⁹⁹ The DPRRC disagreed with this view because the powers in the 2006 Act are limited to a *particular purpose* and cannot be used to abolish or create a regulatory function, whereas neither of these limits applied to the Public Bodies Bill.¹⁰⁰ By dissecting the Minister's counter-argument, the DPRRC was able to progress the debate on the nature of the problem with the scope of the Bill. The DPRRC's third report on the Bill, published on 8 March, reiterated the point that the powers needed to be limited to a specific purpose.¹⁰¹

On 4 April the Government moved an amendment that responded directly to the DPRRC's demand for a provision that would limit the purpose of the main powers in the Bill.¹⁰² It limited the purpose of the order to 'improving the exercise of public functions, having regard to a) efficiency b) effectiveness c) economy d) securing accountability to Ministers'.¹⁰³ The explanatory document which must accompany a draft order must explain

⁹⁸ The Delegated Powers and Regulatory Reform Committee (n 79) para 4.

⁹⁹ The Delegated Powers and Regulatory Reform Committee (n 79) para 22.

¹⁰⁰ Ibid.

¹⁰¹ The Delegated Powers and Regulatory Reform Committee, *Government Amendments: The Public Bodies Bill*, (HL 2010-12, 108) para 12.

¹⁰² HL Deb 4 April 2011, vol 726, col 1530.

¹⁰³ HL Deb 4 April 2011, vol 726, col 1529.

how the order serves these purposes. Despite the relative vagueness of the purposes listed, and the use of the term ‘having regard’ as opposed to more mandatory language, the amendment nonetheless added an additional limit to the scope of the powers.

Sunset clause

The first report of the DPRRC recommended that a sunset clause be added to the Bill.¹⁰⁴ Baroness Royall of Blaisdown, a member of the DPRRC, followed this up by moving an amendment to introduce a sunset clause.¹⁰⁵ She explained: ‘It is not right and proper that powers granted by the other schedules are left unchecked for Parliament after Parliament’.¹⁰⁶ She explained that she learnt the value of sunset clauses from a Constitution Committee report.¹⁰⁷ The Government Minister assured Baroness Royall that he would be willing to introduce a sunset clause. As a consequence Royall withdrew her amendment. On 9 May, Baroness Royall of Blaisdon introduced a sunset clause. It was supported by Government and was agreed without amendment.¹⁰⁸ It had the effect of sunseting each of the entries to the schedules, so that each entry will come to an end five years after the day the Act comes into force. As each entry is time-limited rather than the Bill itself, it remains possible for the Bill to act as the legislative vehicle for future public bodies reform. The Bill could be

¹⁰⁴ The Delegated Powers and Regulatory Reform Committee, *The Public Bodies Bill* (HL 2010-12, 57) para 44.

¹⁰⁵ HL Deb 23 November 2010, vol 722, col 1042.

¹⁰⁶ *Ibid.*

¹⁰⁷ HL Deb 23 November 2010, vol 722, col 1044.

¹⁰⁸ HL Deb 9 May 2011, vol 727, col 673.

repopulated in the future through primary legislation.¹⁰⁹ The sunset clause is an important example of a legislative tool that can allow Parliament to increase its ability to hold the Government to account. The use of such a tool can be justified when a Bill represents a challenge to the balance of power between Parliament and Government. The clause acts as a sort of insurance policy, to limit the risk of the Bill's transfer of power.

Conclusion

Read together, these three limits described above changed the nature of the Henry VIII powers in the Bill. The interpretation of norms relating to the use of Henry VIII powers served as an analytical basis for each of the three amendments made. The legislative process is sometimes seen as a forum for policy debate. However, this discussion has shown that the principles of the process can also be translated into substantive provisions. Parliamentary constitutional interpretation is the practice that moulds these principles into practical solutions to difficult constitutional questions.

3.2.5 Parliamentary procedure

Unlike the opposition to the scope of the order-making powers in the Bill, the argument for greater parliamentary oversight of the order-making procedure within the Bill was met with sustained resistance from the Government. The Bill as introduced used a simple affirmative procedure and the complex negotiations towards an alternative procedure during the committee stage reflect the Lords' understanding of parliamentary

¹⁰⁹ House of Commons Library 'Research Paper 11/50: The Public Bodies Bill (13 June 2011) para 7.6.

procedures. The pattern of development was similar to that of the legal restrictions on the scope of the order-making power, in that the Constitution Committee that raised the issue initially, and then the DPRRC, provided the detailed analysis of the procedure during the more intricate negotiations of the committee stage. A further parallel was that the precedent of the Legislative and Regulatory Reform Act 2006 dominated the debate. The Government also made use of the example of the 2006 Act to argue against a procedure that would allow Parliament to amend an order made under the Bill. The arguments used by Government are instructive of how it can also make use of legislative precedents to strengthen its own justification for its position on the Bill.

The DPRRC played a major role in making the case for strengthening the parliamentary oversight of the order-making powers within the Bill. In its first report on the Bill, the DPRRC made the case for the use of the same super-affirmative procedure that was used in the Legislative and Regulatory Reform Act 2006, primarily because it gives Parliament an opportunity to make representations on a draft order, which in turn enables the Government to change the order.¹¹⁰ The DPRRC's second report on the Bill contained detailed analysis of the Government's amendments to the procedure. The Government had introduced an 'enhanced-affirmative' procedure, similar to the super-affirmative procedure, in that it provided for different levels of scrutiny. But crucial differences with the 2006 Act

¹¹⁰ The Delegated Powers and Regulatory Reform Committee, *The Public Bodies Bill* (HL 2010-12, 57) para 42.

remained, and the report outlined three main differences between the two procedures.

The 2006 Act's requirement for the Minister to have regard for representations, resolutions and recommendations is triggered merely by a recommendation of a committee of either House, whereas for this Bill it required a resolution of the House.¹¹¹ The 2006 Act procedure contained a veto procedure, which meant that a committee can stop proceedings until a resolution of the House reverses it, but this Bill did not use this 'veto' mechanism.¹¹² Lastly, the 2006 Act required that a Minister 'wishing to proceed with an order unaltered after having been required to have regard to representations must lay a statement before Parliament giving details of any representations received'.¹¹³ The DPRRC report disagreed with the Government's view that the discrepancy was justified by the fact that the powers in the Bill are narrower than those in the 2006 Act.¹¹⁴ While it was true that the powers of the 2006 Act potentially applied to a wide range of legislation and this Bill only applied to listed Public Bodies, the DPRRC argued that the powers of the 2006 Act were limited by a stated purpose, namely to reduce legislative burdens and to promote regulatory principles, which lessened the potential controversy of the orders.

¹¹¹ The Delegated Powers and Regulatory Reform Committee, *The Public Bodies Bill*, (HL 2010-12, 62) para 24 (a).

¹¹² The Delegated Powers and Regulatory Reform Committee (n 112) para 24 (b).

¹¹³ The Delegated Powers and Regulatory Reform Committee (n 112) para 24 (c).

¹¹⁴ The Delegated Powers and Regulatory Reform Committee (n 112) para 22.

In contrast, the DPRRC claimed that the order-making powers in the Public Bodies Bill could potentially be used to make quite controversial changes to important public bodies, and such measures should be subject to effective scrutiny.¹¹⁵ The Government was intent on designing a system that could allow uncontroversial measures to be passed quickly and to allow more controversial orders to be subject to a rigorous process, but this proved a challenging task.

Lord Hunt of Kings Heath and Baroness Royall, Leader of the Opposition in the House of Lords, tabled a number of amendments designed to introduce a procedure similar to the super-affirmative procedure used in the Legislative and Regulatory Reform Act 2006.¹¹⁶ They explained that the most important part of that procedure was that it ‘provides for a committee of either house, charged with reporting on a draft order, to recommend that no further proceedings be taken in relation to the draft order, unless that recommendation is rejected by a resolution of the House’.¹¹⁷ This is known as the veto. Their proposed procedure would also allow the committee to recommend that an order be amended, or that it should be brought forward as primary legislation.¹¹⁸ Baroness Thomas of Winchester (Liberal Democrat) then made an intervention, speaking as the Chair of the DPRRC. She reiterated the point made in the DPRRC’s second report, that the parliamentary procedure set out in the Government amendments was not as

¹¹⁵ The Delegated Powers and Regulatory Reform Committee, *Government Amendments: The Public Bodies Bill*, (HL 2010-12, 108) para 18.

¹¹⁶ HL Deb 23 November 2010, vol 722, col 1086.

¹¹⁷ HL Deb 23 November 2010, vol 722, col 1087.

¹¹⁸ HL Deb 23 November 2010, vol 722, cols 1088-89.

effective as that contained within the 2006 Act and that the crucial difference was the absence of the veto power for the parliamentary committee in this procedure.¹¹⁹

The Government rejected the procedure suggested by Lord Hunt of Kings Heath and Baroness Royall. The explanation of the rejection by the Minister represents the most sophisticated justification of the constitutionally controversial elements of the Bill offered by the Government during the legislative process. The Minister argued that to allow a committee to reject and amend an order, as the Hunt and Royall procedure proposed, would ‘fundamentally change the role of Parliament in dealing with secondary legislation’.¹²⁰ He noted that giving the House the power to amend secondary orders would be ‘virtually unprecedented’, and very difficult to achieve effectively.¹²¹ This point essentially draws upon the conventions that regulate the Lords’ relationship with secondary legislation. The Lords do not routinely vote down the Government’s legislation, and some see this practice as a result of the primacy of the House of Commons. Whatever the source, the practice highlights the limits of the Lords’ powers in relation to the Government. The second reason for rejecting the suggested procedure was that the Public Bodies Bill’s order-making powers, the Minister claimed, are narrower than the 2006 Act.¹²² He explained that such a procedure would not be proportionate to the powers in the Bill, and it should be remembered that at this point schedule 7 had not yet been removed from

¹¹⁹ Ibid.

¹²⁰ HL Deb 23 November 2010, vol 722, col 1093.

¹²¹ Ibid.

¹²² Ibid.

the Bill. This view directly contradicted that of the DPRRC, referred to above. The third reason was that if this process were to apply to each and every order made under the Bill this would amount to an ‘excessive hindrance on the reform programme of the Government’.¹²³ This again appeared to rely on the constitutional rationale that Parliament should not unduly restrict the Government’s legislative business, which seems to contradict the thrust of the arguments made by opponents to the Bill as introduced and accepted by Government. He added that the Government’s preferred procedure was ‘both sensible and proportionate, striking a balance between Parliament's ability to scrutinise and the Executive's ability to take forward its programme for government’.¹²⁴ Despite his defence of their proposal, he indicated that he was willing to consider the DPRRC’s arguments. In response, Lord Taylor did not agree that his proposal would necessarily grant the House the ability to amend orders, and agreed to withdraw his amendment on the basis of the Government’s assurances to look again at the issue.

In response, Lord Hunt of Kings Heath challenged the Minister’s constitutional interpretation of the conventions that govern the House of Lords’ scrutiny of delegated legislation. He said:

I dispute that interpretation. I refer him to paragraph 10.02 of the *Companion* which states clearly: ‘The House of Lords has only occasionally rejected delegated legislation’. It then goes on to say: ‘The House has resolved “That this House affirms its unfettered

¹²³ HL Deb 23 November 2010, vol 722, col 1094.

¹²⁴ Ibid.

freedom to vote on any subordinate legislation submitted for its consideration””.¹²⁵

He also mentioned a report of the Joint Committee on Conventions which recommended that it was perfectly proper for the House of Lords to defeat secondary legislation in circumstances when the parent bill was a skeletal bill.¹²⁶ The Minister responded, stating: ‘I think that the only statutory instrument to have been voted down in my time in this House was the casinos order. I think that it is reasonable to say that we do not do it. Whether we should is a different issue altogether.’¹²⁷ Lord Norton of Louth argued that the fact that the Lords had not used its powers does not mean that it is a convention, stating ‘I see no reason why we should not exercise our due powers’.¹²⁸ Despite the difference of opinion, the engagement with the disputed convention shows how parliamentary constitutional interpretation can be used to reveal the content and status of important constitutional norms, even if what they reveal is that reasonable people disagree on how they should be interpreted.

On 7 March the DPRRC published another report on the Bill, which responded to the latest set of Government amendments to the parliamentary procedure.¹²⁹ Government amendments had removed one of the DPRRC’s previous objections to the procedure, and now a committee of the House, rather than a resolution of the House, could trigger the enhanced

¹²⁵ HL Deb 23 November 2010, vol 722, col 1096.

¹²⁶ HL Deb 23 November 2010, vol 722, col 1097.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ The Delegated Powers and Regulatory Reform Committee, *Government Amendments: The Public Bodies Bill*, (HL 2010-12, 108).

procedure.¹³⁰ However, the other two distinctions remained, and the report drew attention to the limitations of such a procedure. In particular, it reiterated the argument that order-making powers in the 2006 Act were not to be used for ‘controversial’ matters, and the DPRRC implied that the procedure might not be suited to scrutinising the type of reform that could be made through the powers in this Bill.¹³¹

On 9 March Lord Hunt of Kings Heath again moved a series of amendments to the parliamentary procedure proposed by Government.¹³² The most significant of these, Amendment 118B, would give the parliamentary committee the power to amend as well as veto draft orders and to recommend that the proposal be taken forward instead through primary legislation.¹³³ The Minister reiterated his opposition to this power on the basis that it would fundamentally alter the House of Lords’ relationship with secondary legislation, and to effect this change was not within the scope of this Bill.¹³⁴ He also argued again that such a restricted procedure was not proportionate to the scope of the Bill, especially now that schedule 7 had been removed.¹³⁵ Further, the Minister explained that the Government had amended its own amendment so that the enhanced scrutiny procedure could now be activated by a recommendation of a committee of either House.¹³⁶

¹³⁰ The Delegated Powers and Regulatory Reform Committee (n 129) para 15.

¹³¹ The Delegated Powers and Regulatory Reform Committee (n 129) para 18.

¹³² HL Deb 9 March 2011, vol 725, col 1719.

¹³³ HL Deb 9 March 2011, vol 725, cols 1721-23.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

In the report stage, on 4 April, a final attempt was made by Lord Hunt of Kings Heath to strengthen the parliamentary procedure used in the Bill.¹³⁷ In response, the Minister restated the now well-rehearsed position on the comparison between this Bill and the 2006 Act:

To impose a veto on these orders by a single Select Committee of either House and a capacity for Parliament to amend orders under this bill is excessive, bearing in mind that Parliament will have given its explicit consent both to the Bill as a whole and to the inclusion of each separate body in the schedules.¹³⁸

This line of reasoning would appear to clarify the Government's position on the Lords' relationship with secondary legislation, in effect saying that the consent to the primary legislation justifies limiting the Lords' role over the order-making process. The final attempt at forcing a change was put to the House and defeated by 218 to 158.¹³⁹

The final version of the procedure fell short of what many peers argued was required, and the Government resolutely opposed the idea that a super-affirmative procedure, with a veto power, should be used in this case. Despite not securing the change to the extent that many would have liked, the repeated exchanges over the correct procedure served to highlight the Government's position on the constitutional boundaries that regulate Parliament's relationship with secondary legislation.

¹³⁷ HL Deb 4 April 2011, vol 726, cols 1562-1578.

¹³⁸ HL Deb 4 April 2011, vol 726, col 1577.

¹³⁹ HL Deb 4 April 2011, vol 726, col 1585.

Conclusion

The changes made in the Lords that are detailed above were approved by the Commons and formed part of the Bill when it received the Royal Assent. It is important to emphasise that the passage of this Bill, and the extent of the amendments, are far from typical. As Russell notes, the changes made to the Bill were notably ‘far-reaching’.¹⁴⁰ As introduced, the Bill contained very limited restrictions on the delegated powers in the Bill, but by the time it reached the Commons it contained a number of different forms of limits, and most notably, the most constitutionally offensive Henry VIII power had been removed. While the significance of these changes should not be played down, it is also important to recognise that some of the changes described could be what Cowley calls ‘carefully calibrated concessions’.¹⁴¹ The Government sometimes includes clauses that it is not committed to, in order to soak up scrutiny in the Lords, and such was the level of concessions during the passage of this Bill that it is possible that the Government was never committed to schedule 7. The causation behind the changes is not my primary focus, but it is important to recognise that within the parliamentary context the Government is to a large extent in control of how much influence constitutional interpretation has on a Bill. In this case, however, the Government’s attitude meant constitutional interpretation was central to the passage of the Bill; and here the aim is to summarise some of the features of the practice that emerged from the debate.

¹⁴⁰ Russell (n 82) 188.

¹⁴¹ P Cowley, *The Rebels: How Blair Misled his Majority* (Politico’s 2005) 91.

The first feature is the central role of parliamentary committees. Parliamentary committees have a number of institutional features, which provide a platform for constitutional interpretation within the legislative process. The first is the ability to issue reports that generate responses on the floor on the House of Lords and from Government. Each of the two committees involved in the analysis of the Bill was able to produce reports that communicated a level of constitutional analysis that would be very hard to replicate in a speech. The reporting function allows this constitutional analysis to gain a high level of prominence. Further, the nature of the constitutional effect of this particular Bill produced an effective double pincer movement, whereby the Constitution Committee analysed the broad principles at the outset, and the DPRRC followed up with the detail in three subsequent reports during the negotiations on how to amend the Bill. Their approaches perfectly complemented each other, maximizing their influence upon the debate. The DPRRC's ability to follow up and issue additional reports was especially important to the debate, as the Bill was subject to so many amendments. The multiple interventions ensured that the authority in Parliament on the balance between primary and secondary was able to contribute to the debate at every stage in the Lords.

A second feature of the practice was its ability to contribute to the process of holding the Government to account for the constitutional effect of the Bill. Despite the proactive attitude of the Government, and its willingness to collaborate, it is important that Parliament be able to hold the Government

to account by extracting and scrutinising its reasons for the constitutional effect of proposed change to the law. One of the distinguishing features of the parliamentary form of constitutional interpretation is that it forms apart of the negotiations between the Government and those parliamentarians engaged in scrutiny of a Bill. This dynamic is central to the parliamentary legislative process, and one of the values of constitutional interpretation is that it can supply a principled basis for scrutiny and negotiation on the constitutional effect of a Bill. This in turn can prompt the Government to develop its own justification for the constitutional effect of the Bill. The DPRRC's use of the Legislative and Regulatory Reform Act 2006 as a comparison prompted the Government to explain why it thought that the Public Bodies Bill was narrower in scope. Prompting this type of justification of the constitutional effect of a Bill is a feature of the practice. Constitutional interpretation presents an analytical context for evaluating the Bill, which can help to explain what the effect of a Bill would be. In this sense the practice contributes to the accountability relationship between Parliament and Government, by increasing the level of justification of the constitutional effect of a Bill. This could be seen in the DPRRC analysis of the Government's response to their first report. By facilitating exchanges between Government and parliamentary actors on the constitutional effect of the Bill, the practice is able to contribute to creating a site for 'Socratic contestation' of the meaning of the constitutional effect of the Bill.¹⁴² Kumm defines Socratic contestation as 'the practice of critically engaging

¹⁴² M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 142, 143.

authorities, in order to assess whether the claims they make are based in good reasons'.¹⁴³ This contributes to a core function of the parliamentary legislative process: extracting, publicising and scrutinising the reasons for changing the law before the law is enacted.¹⁴⁴ In this sense the interpretation of the constitutional effect provides an enhanced level of focus, whereby constitutional norms can be used as criteria to challenge the Government's justification for the detail within a Bill.

The third feature of parliamentary constitutional interpretation is the way it can be used to develop, to clarify and to highlight disagreements about the norms of the constitution. The constitution and the law of this country provide little in the way of concrete accessible guidance as to how Henry VIII powers should be designed and utilised. And yet, during the debate on this Bill, a number of parliamentary actors were able to formulate rules that could be applied to the clauses before them. Parliamentary actors were able to take basic constitutional principles, for example parliamentary scrutiny of legislation should be allowed to be effective, and to apply them to the particular circumstances of the Bill by interpreting particular tests, for example Henry VIII powers should be subject to adequate oversight. The development of these concrete tests, applicable to the legislative context, made the content of the constitution relevant to the development of the Bill. This was valuable in terms of improving the fit of the Bill with the constitution, but also because it made the content of these important

¹⁴³ M Kumm, 'Institutionalising Socratic Contestation: the Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 1, 3.

¹⁴⁴ *Ibid.*

constitutional norms more accessible. Constitutional interpretation in the UK is often not a question of discovering the intention of the original authors, because many of the principles are unwritten or uncodified. While this adds a degree of uncertainty and inaccessibility to the substance of the constitution, it also allows for a degree of dynamism in that it leaves scope for parliamentary actors, such as the Constitution Committee and DPRRC, to contribute to the development of the meaning of the constitution. The distinctive parliamentary perspective provided by constitutional interpretation within the legislative process strengthens the content of the constitution. Parliamentarians are ultimately constitutionally responsible for the norms that regulate their relationship with the Government, and it is up to them to ensure their continued relevance and development. It is only parliamentarians that can legitimately develop the standards and rules that relate to the correct balance between primary and secondary legislation, and a number of them took the opportunity to use constitutional interpretation to do this during the debate on this Bill – and make it count towards holding the Government to account and negotiating the content of the Bill.

The fourth feature to emerge from the use of constitutional interpretation during the debate was the role of legislation. Legislation is an important tool for parliamentary scrutiny, and it appears that it is especially important to assessing the constitutional effect of a Bill. Unlike interpreting unwritten or codified principles, legislation has an author, and sometimes has a history of negotiation, which contributes to its accessibility. The Legislative and Regulatory Reform Act 2006 proved central to the constitutional

interpretation during the passage of the Public Bodies Bill, and a number of points can be deduced from the use of this comparison as a tool for analysis. One of the primary reasons why it proved useful was that the House of Lords, including the Constitution Committee and the DPRRC, were heavily involved in the negotiations over the constitutional effect of the 2006 Act. In other words, it was not simply the Act itself that made it relevant, but it was also the debate, the analysis, and the constitutional interpretation within Parliament that informed the debate on the Public Bodies Bill. So while the statutory form of the provisions might make them easier to interpret and apply to a Bill than uncodified principles, their ability to serve as tools for constitutional interpretation was also a product of the quality of the scrutiny and debate that preceded their enactment. There is a cyclical quality of parliamentary constitutional interpretation, whereby parliamentarians are able to import constitutional meaning into a statute through scrutiny. The enacted provision can then be used as a point of reference for further scrutiny. This appears to be an element of the practice with great potential.

4. The Health and Social Care Bill

“It shall be the duty of the Minister of Health to ... provide or secure the effective provision of services in accordance with the following provisions of this Act.” The language is simple; it is as curt as the Commandments. This is, however, the greatest task which has ever been placed upon the shoulders of any one man.¹

Lord Jowitt²

The Health and Social Care Bill sought to reconfigure the Secretary of State for Health’s statutory responsibility for the National Health Service (NHS) in England, and this change was examined in detail within Parliament during the passage of the Bill. The change prompted concern, in part because the Bill proposed to remove the Secretary of State for Health’s historic duty ‘to provide’, to which Lord Jowitt is referring in the quotation above. This prompted a number of parliamentarians to question the constitutional effect of the Bill. This case study critically analyses the interpretation of constitutional norms in the debate on this particular aspect of the Bill. The research aims are the same as in the previous chapter: to identify the main examples of constitutional interpretation, to examine the normative content of the practice, and to identify what the practice brought to the scrutiny process within Parliament and to the constitution.

¹ HL Deb 8 October 1946, vol 143, col 3.

² Peer (Labour), Lord Chancellor (1945-1951).

The parliamentary constitutional interpretation prompted by the Health and Social Care Bill shares two similarities with that detailed in the previous chapter. The first is the role played by the Constitution Committee, whose report on this Bill was crucial in the deliberations in the Lords. The second is the focus upon the existing legislation. The constitutional effect of the Health and Social Care Bill related to a proposed amendment to legislative provisions within the National Health Service Act 2006 (the NHS Act 2006), which were originally introduced to the statute book by the National Health Service Act 1946 (the NHS Act 1946). A number of parliamentarians grappled with the implications of the provisions on the statute book that the Bill sought to change, and this focus informed both the character of the constitutional interpretation and the nature of its contribution to the debate.

In contrast with the previous case study, a distinct feature of the examples of practice examined in the debate on the Health and Social Care Bill is the uncertainty over the status, meaning and practical effect of the constitutional norms that were interpreted. This uncertainty changed the role of constitutional interpretation within the debate, and made it harder for parliamentarians to challenge and to justify the constitutional effect of the Bill.

4.1 The constitutional framework of the Bill

The Health and Social Care Bill was not a first class constitutional Bill. This section provides some context to the debate on the constitutional effect of the Bill by setting out the basic normative architecture used by those

engaged in constitutional interpretation during the debate, including the relevant clauses within the Bill in the form in which they were introduced to the House of Commons.

The Health and Social Care Bill was arguably the largest and most significant piece of health legislation introduced to Parliament since the creation of the NHS Act 1946.³ It was designed to give effect to the policy outlined in the Coalition Government's White Paper *Equity and excellence: Liberating the NHS*.⁴ The white paper explained that the Government aims 'to reduce the central direction of the NHS, to engage doctors in the commissioning of health services, and to give patients greater choice'.⁵ As Davies explains, 'the main theme of the reforms is to make the NHS market more "real"'.⁶ It is also worth noting that the policy was not in the manifestos of either the Conservatives or the Liberal Democrats. To put it mildly, the changes proposed to the NHS within the Bill were controversial. This case study focuses on a relatively small part of the debate during the passage of the Bill. This limited focus means that it inevitably presents an incomplete picture of the overall parliamentary debate on the Bill.

As part of their wider reorganisation of the NHS, the Government sought to alter the statutory responsibilities of the Secretary of State for Health to

³ House of Commons Library, Health and Social Care Bill (Research Paper 11/11, 2011) 1.

⁴ Department of Health, *Equity and excellence: liberating the NHS* (Cm 7881, 2010).

⁵ Ibid.

⁶ A Davies, 'This Time, it's for Real: The Health and Social Care Act 2012' (2013) 76 *Modern Law Review* 564, 565.

reflect the reality of his role under the new statutory regime. This change is what provoked the debate on the constitutional effect of the Bill within Parliament, and the normative architecture of this particular change is crucial to analysing the nature of that debate. A Secretary of State's political responsibility for his or her department is regulated by the convention of individual ministerial responsibility. This convention is not defined by statute, nor does it owe its authority to any particular enactment. Nevertheless, when the NHS was created, the Government of the day sought to define the meaning of this convention through statute for the particular nature of the role of the Minister for Health, by introducing a formal legal responsibility for specific policy goals. It hoped this would enhance the accountability relationship between the citizen, Parliament, the Government and the National Health Service. The Health and Social Care Bill sought to alter that accountability relationship, and this provided a test of parliamentarians' understanding of that relationship and the role of the relevant statutory provision within it.

4.1.1 The Bill as introduced to the House of Commons

When the Bill was introduced to the House of Commons, clause 1 of the Bill retained the Secretary of State's duty to promote a 'comprehensive health service'.⁷ However, clause 1(1) of the Bill removed section 1(2), the 'must for that purpose provide or secure the provision of services' subsection of the NHS Act 2006, and replaced it with:

⁷ Explanatory Notes to the Health and Social Care Bill (2010-12) 132, para 63.

... in exercising functions in relation to a body mentioned in subsection (2A), *must act with a view* to securing the provision of services for the purposes of the health service in accordance with this Act.⁸

The explanatory notes on clause 1 said that rather than directly conferring this duty upon the Secretary of State, who then would have delegated this task to the Strategic Health Authorities and Primary Care Trusts, under this Bill the responsibility to provide would be given by statute directly to the new NHS Commissioning Board.⁹ Clause 10 of the Bill transferred the specific duties within section 3(1) of the NHS Act 2006 from the Secretary of State to the NHS Commissioning Board and the commissioning consortia. This change appeared to change the nature of the accountability of the Secretary of State. The removal of the ‘duty to provide’ in section 1(2) is a direct consequence of the transfer of accountability for the provision of services away from the Secretary of State by clause 10 of the Bill. The duty to provide within the duty to promote a comprehensive health service became redundant, once the duty to provide specific services was removed.

Other clauses within Part 1 of the Bill did little to assuage doubts raised by the transfer, and clause 4, which contained a duty for the Secretary of State ‘to promote autonomy’, increased them. Clause 4 sought ‘to establish an overarching principle that the Secretary of State should act with a view to

⁸ The Health and Social Care HC Bill (2010-12) [132] Part 1 cl 1 (2)(b) (emphasis added).

⁹ Explanatory Notes to the Health and Social Care Bill (2010-12) 132, para 66.

promoting autonomy in the health service’.¹⁰ In order to understand why these changes to the NHS Act 2006 prompted criticism of the constitutional effect of the Bill, it is important to understand the statutory origins of the 2006 Act.

4.1.2 The duty to provide

The National Health Services Act 1946 created the NHS. This Act was not ‘constitutional’ in the conventional sense. However, it did create a legislative scheme to regulate the political and legal accountability of the Minister of Health. Section 1(1) of the 1946 Act stated:

It shall be the duty of the Minister of Health (hereafter in this Act referred to as ‘the Minister’) to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act.

Section 3(1) of the 1946 Act set out the specific services that the Minister should secure:

As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements,

¹⁰ Explanatory Notes to the Health and Social Care Bill (2010-12) 132 para 74.

accommodation and services of the following descriptions, that is to say:-

- (a) hospital accommodation;
- (b) medical [defined to include surgical], nursing and other services required at or for the purposes of hospitals;
- (c) the services of specialists, whether at a hospital, a health centre provided under Part III of this Act or a clinic or, if necessary on medical grounds, at the home of the patient;
- (d) and any accommodation and service provided under this section are in this Act referred to as “hospital and specialist services”.

The use of the words ‘to provide’ in both sections was not a coincidence; the two sections should be read together. Section 1(1) set out the basic duty of the Minister of Health for the health service. The Minister was under a duty to promote the establishment of a comprehensive health service, and in discharging that duty the Minister must provide the services required by the Act. The duty to provide was not separate from the duty to promote - they are one duty, and the specific content of the duty is set out in section 3(1). Put another way, the duty to provide specific services was part of, rather than additional to, the duty to promote a comprehensive health service. Although the Minister of Health was not meant physically to provide the said services, it would seem that the aim of the scheme was to create a legally binding duty, which would constrain the Minister’s political discretion relating to the National Health Service. It was this purpose that supplied the constitutional effect of the Act.

During the passage of the 1946 Act through Parliament, the Minister responsible, Aneurin Bevan MP (Labour), said the following about the accountability scheme:

Responsibility for the co-ordination of the different aspects of the scheme rests where Parliament imposes it - upon the Minister of Health. That is where it should be. Clause 1 places upon the Minister, and not upon regional boards, the obligation of providing health services for all.¹¹

The provision was designed to send a message to the public that a politically accountable Minister was under direct legal responsibility for the NHS. Bevan described it as a 'contract with the citizen'.¹² Sir Henry Willink (Conservative), who was the Health Minister during the wartime Coalition, challenged the scheme during the debate on the Bill. Willink argued that it represented a departure from how 'our governmental system' regulates the responsibilities of a Minister of the Crown.¹³ He said:

The Minister of Education is not placed under a duty to provide schools. He is under the sort of duty, which is expressed in Clause 1 of this Bill, to promote everything to do with the improvement of education in this country.¹⁴

In response Bevan said:

¹¹ SC Deb (C) 15 May 1946, vol 143, col 1066.

¹² Ibid.

¹³ Ibid.

¹⁴ SC Deb (C) 15 May 1946, vol 143, cols 1056-61.

What the scheme does is *impose* upon the Minister *the obligation to provide the service* and it entrusts its administration to local bodies.¹⁵

He objected to the idea of giving the service providers, rather than the Minister, the duty to provide because:

It would be difficult for us to say to the citizens of Great Britain, “As from a certain date we accept the obligation of providing you with a hospital, but we entrust this provision to someone who can deny it to you.”¹⁶

Bevan’s comments indicate that the scheme was an innovative attempt to strengthen political accountability in the context of nationalisation. Willink’s criticism indicates that at the time the scheme was thought of as a change to the relationship between the Minister and Parliament, although the precise nature of that change is difficult to identify.¹⁷

As a legal duty, one might expect that the duty to provide would bolster the Secretary of State’s legal accountability through judicial review. This does not appear to be right in this case. The relevant case law indicates that the provisions were designed to limit the ability of the courts to enforce the duty to provide through judicial review. Although it has been used as a basis for judicial review, the courts have consistently said that the duty to provide is

¹⁵ SC Deb (C) 15 May 1946, vol 143, cols 1066-1067 (emphasis added).

¹⁶ Ibid.

¹⁷ Subsequent legislation on the NHS, both the National Health Service Act 1977 and National Health Act 2006 preserved the duty to provide in both sections 1 and 3.

not enforceable. In *ex parte Hincks and others*,¹⁸ the applicants sought a declaration of the court saying that the Secretary of State had not fulfilled his duty in section 1 (1) and section 3 (1) of the 1977 Act. Lord Denning MR responded that it was an attractive argument, as there were no express provisions to limit the expenditure of the duty to provide. But the problem was that the words ‘to such extent as he considers necessary to meet all reasonable requirements’ allow the Secretary of State the discretion to take into account economic resources when considering how to give effect to that obligation. In a more recent case, *R v NHS Oldham (ex parte Booker)*,¹⁹ Judge Pelling QC said in 2010 of the scheme in the National Health Service Act 2006:

Section 1 (1) and (2) of the 2006 Act together establish as a target duty the provision of a comprehensive health service free to all at the point of delivery. However, Section 3 creates an enforceable duty to provide care facilities for those who are ill or have suffered illness subject to the qualification that the secretary of state or the PCT as his delegate need not provide such services where he or it does not consider they are reasonably required or would be necessary to meet a reasonable requirement.

Although this later judgment seems to indicate that elements of the scheme are enforceable, the reality was that it appeared extremely difficult to establish a breach of the terms of the scheme due to the breadth of the discretion held by the Secretary of State.

¹⁸ *R v Secretary of State for Social Services, West Midlands Regional Health Authority and Birmingham Area Health Authority (Teaching), ex parte Hincks and others* [1980] 1 BMLR 93, CA.

¹⁹ [2010] EWHC 2593 (Admin).

Perhaps the most significant comment from *R v NHS Oldham (ex parte Booker)* was the characterisation of the scheme as a ‘target duty’.²⁰ A target duty is a policy aim, codified in statute.²¹ A recent prominent example of the use of target duties can be found in the Child Poverty Act 2010. The 2010 Act contains a number of target duties, all of which should be achieved in the financial year beginning 1 April 2020. For example, section 2 (1) (a) reads:

It is the duty of the Secretary of State to ensure that the following targets are met in relation to the United Kingdom in relation to the target year -

(a) the relative low income target in section 3.

A target duty is not meant to be judicially enforceable; rather, it is a political tool designed to provide a signal of intent and to act as a constraint on the political discretion of subsequent governments. A target duty is aspirational, it can set a target that might be considered unrealistic but is nonetheless valuable because it represents ends to which the Government should aspire. The two schemes are different because the scheme that in the 1946 Act does not include a specific date by which the goal must be achieved. Thought of as a target duty, the duty to provide in the 1946 Act provided a permanent duty to work toward specific policy goals, and it appears that the target duty served to complement and strengthen the convention of individual ministerial responsibility.

²⁰ Ibid.

²¹ See A Lee and J Leslie, ‘Judicial Review of Target-Setting Legislation’ [2010] *Judicial Review* 236.

The convention of individual ministerial responsibility regulates a Minister's political responsibility for his or her Department. The Ministerial Code codifies some of the convention's content. It provides that:

Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies.²²

Tomkins explains that the core constitutional requirement of the convention is that a Minister is responsible to Parliament for 'the minister's own political decisions and actions, the minister's private life and the actions and decisions of his department'.²³ As a result of this, the Secretary of State for Health is therefore politically responsible for the decisions he takes and for those decisions made within his department. So while the scheme first included in the 1946 Act is not needed to establish the political responsibility of the Secretary of State for Health, the scheme does in one sense bolster it by specifying the conditions under which the holder of that office should be held to account. As it was not intended that this should be enforced by the courts, it seems reasonable to assume that the duty was supposed to be enforced by political means, by the Minister himself within his or her department, or via the political and parliamentary process. The target duty served as a commitment device to provide a form of entrenchment of the stated policy aims. Enacting sections 1 and 3 of the 1946 Act meant that any subsequent Parliament that wanted to change the nature of the Secretary of State for Health's role in relationship to the NHS,

²² The Ministerial Code (2010), para 1.2 (b).

²³ A Tomkins, *Public Law* (Clarendon 2003) 144.

would have to amend the provision and evaluate how the role should be regulated by statute.

4.2 The parliamentary debate

The parliamentary scrutiny of the Health and Social Care Bill was exceptional. In effect the Bill had two public committee stages in the House of Commons, occurring either side of a listening exercise: the Future Forum. The Future Forum resulted in a large number of amendments being made in the House of Commons, and ensured that the Bill's passage through Parliament was longer than normal, taking just under 14 months to be enacted. The debate on the constitutional effect of the Bill represents a small fraction of the total parliamentary debate on the Bill, and there were many aspects that were considered to be more controversial and significant in both Houses. This section only focuses on the debate on clauses 1 and 10 of the Bill, and as a result presents an incomplete picture.²⁴ This is an unavoidable consequence of the focus upon the constitutional interpretation during the debate.

This section analyses how parliamentarians used constitutional interpretation during the debates, and evaluates the contribution made by this practice to passage of the Bill through Parliament. It also seeks to examine the implications for the constitution. The change to the duty 'to provide' was fully articulated as a constitutional issue only when the

²⁴ For a fuller account see Davies (n 6); and N Timmins, *Never Again? The Story of the Health and Social Care Act 2012* (London: Institute for Government and The King's Fund, 2012).

Constitution Committee reported on the Bill. Prior to that, although the change had been scrutinised and criticised in the Commons, the language of constitutionality had not been used. In part this is due to the basic problem surrounding the status of the relevant sections of the NHS Act 2006 and the implications of the changes proposed to them. Few parliamentarians who criticised the proposed change to sections 1 and 3 of the NHS Act 2006 drew a connection between the change and individual ministerial responsibility, or analysed the purpose of the sections within the 2006 Act. This is not necessarily their fault, as both of these tasks were far from straightforward even for the most committed critics of the Bill.

4.2.1 The House of Commons

When introducing the Bill, Andrew Lansley MP (Conservative), Secretary of State for Health, did not address the clauses referred to above in much detail. However, he did make some comments that provided some explanation of why the Government wanted to alter the scheme. He stated:

Until now, legislation on the NHS has more or less said, "The NHS is whatever the Secretary of State chooses to make it at any given moment." ... I intend to be the first Secretary of State in the history of the NHS who, rather than grabbing more power or holding on to it, will give it away.²⁵

The point was again emphasised in the speech when he said that the Bill would cause a 'shift in power away from politicians'.²⁶ The Government's desire to decentralise power in the NHS clashed with the Secretary of

²⁵ HC Deb 31 January 2011, vol 522, col 616.

²⁶ HC Deb 31 January 2011, vol 522, col 609.

State's duty to provide services in the 2006 Act. The question for the Government was how would it ensure that the political accountability of the Secretary of State was not weakened by the removal of the statutory responsibility.

During the first committee stage in the Commons, Derek Twigg MP (Labour) moved an amendment which would insert 'and is accountable to Parliament for' into clause 1. He explained that the amendment was designed to prompt the Minister to explain how the Bill would affect the accountability of the Secretary of State, as there was genuine uncertainty over how the changes proposed would affect the existing system. Twigg's intervention was the first to identify the potential constitutional effect of the Bill. In response the Minister, Simon Burns MP (Conservative), explained:

New subsection (2)(b) covers the areas where other organisations will be responsible for particular activities. This includes all NHS care - that is, the services commissioned by the NHS commissioning board and consortia - and the local public health responsibilities of local authorities. In those cases, the functions of commissioning and providing services are given explicitly to front-line organisations, not the Department of Health, in line with our strategy for liberating the NHS, which says that commissioners and providers should be free from political interference and micro-management.²⁷

²⁷ Health Bill Deb 15 Feb 2011 cols 187-188.

When pressed on how this would change the Secretary of State's accountability, Simon Burns MP replied, 'the Secretary of State's accountability to Parliament is already integral to the Bill'.²⁸

Later in the debate another justification for the change within clause 1 (2)(b) emerged. Jeremy Lefroy MP (Conservative) put forward the following justification:

We have had a contradiction in legislation, certainly in recent years. On the one hand, the Secretary of State has had quite clear direct responsibility for procuring health services; on the other hand, there has been a quite clear delegation - more than a delegation; a giving away - of power to foundation trusts. I believe that the clause is designed to deal with the tension between those two.²⁹

The Government argued that clause 1 (2)(b) and clause 10 would better reflect the real power structure within the Health Service. Rather than confer on the Secretary of State duties and powers, which he then delegates, the powers would be directly conferred upon the bodies that exercise the relevant powers. While it could be said that the Bill would create a clearer and more transparent power structure, it did not address the fact that the existing system was not an accident of history, it was a deliberately designed structure to ensure that power and duties remained with an accountable and elected member of the Cabinet. This point was made by Derek Twigg MP:

²⁸ Health Bill Deb 15 Feb 2011 col 182.

²⁹ Health Bill Deb 15 Feb 2011 col 192.

It has always been a fundamental principle of the NHS that at its head is an elected politician - a Secretary of State - who acts as a custodian and ultimately takes responsibility for the provision of high-quality and universal health care... I accept the Minister's comment that many of those functions are currently devolved or delegated to bodies such as the strategic health authorities and primary care trusts, which will be abolished under the Bill. However, that remains the duty of the Secretary of State and, most importantly, he remains accountable to Parliament for the provision of services.³⁰

This argument directly challenged the Government's logic. The Secretary of State's duty to provide certain services was not the cause of political interference in the NHS - his powers are set out elsewhere in the legislation. The duty was exclusively designed to reinforce his accountability, and not to do anything else. Twigg's intervention prompted the Government to explain its position in greater detail, but the overriding impression created by this early exchange was that both the Government and the opposition were unsure about how the proposed changes would affect the accountability of the Secretary of State. The Government saw the change as part of de-politicisation of the NHS, but also claimed that the removal of the responsibility 'to provide' would have no impact on the accountability of the Secretary of State. The Government argued that the statutory regulation should reflect the reality that the Secretary of State delegates the provision of services by conferring powers directly upon the relevant bodies, rather

³⁰ Health Bill Deb 15 Feb 2011 col 237.

than have them delegated by the Secretary of State. This conflicted with Bevan's original justification for the duty to provide in 1946, but the practical implications for the relationship between Parliament and the Secretary of State were unclear.

In an unusual move, the Government decided to conduct another listening exercise after the Bill had finished its Commons Committee stage. The Government appointed the Future Forum, composed of experts from across health and social care, to listen to concerns over the Bill and report back to Government. The Future Forum reported its findings on 13 June 2011. It made a number of detailed recommendations for changes to the Government's reforms and legislation, including that the Bill should be amended to make clear that the Secretary of State would remain ultimately accountable for the NHS. This recommendation affirmed the point that proposed regulation of the accountability of the Secretary of State was unclear. The Government indicated in its response to the Future Forum's report that it accepted this recommendation.³¹ On this basis it decided to recommit a number of important clauses to the Commons for further scrutiny in Committee. It explained that it wanted to give Parliament 'sufficient opportunity to scrutinise the Government's proposed changes'.³²

When the Bill was recommitted, the Government tabled a new clause 1 'to remove any doubt that the Secretary of State remains ultimately accountable

³¹ Department of Health 'Government's response to the NHS Future Forum' (Cm 8113 2011).

³² Written Ministerial Statement 14 June 2011.

for the NHS’.³³ The important change from the original drafting of the Bill was in the wording of paragraph 1(2) of the new clause 1. It stated that ‘the Secretary of State must exercise his functions so as to secure that services are provided in accordance with this Act’.³⁴ This change replaces ‘act with a view to’ with the mandatory ‘must exercise his functions as to’. For the Labour members of the Committee this did not go far enough, in that it did not fully revert to the wording of the NHS 2006 Act, in particular as it still omitted the words ‘to provide’.³⁵ In response the Minister, Simon Burns MP, explained:

A duty to provide involves having the premises and the staff necessary to offer health services directly. At present, the Secretary of State has a duty to provide, but even under the current system, that does not reflect the reality of a situation in which commissioning and provision rest with NHS bodies, not the Secretary of State... It is worth noting that, subject to a few exceptions, the duty in section 1(2) of the 2006 Act to “provide or secure the provision of services”, and the section 3 and 12 functions of providing or arranging the provision of particular services, have for many years not been fulfilled by the Secretary of State’s providing or commissioning services directly.³⁶

The Government seemed in effect to be arguing that the duty to provide did not carry with it any consequences for accountability, and therefore could be removed without significantly changing the Secretary of State’s

³³ Health Bill Deb 30 June 2011 col 138.

³⁴ Health and Social Care HC Bill (2010-2012) [221].

³⁵ Health Bill Deb 30 June 2011 col 149.

³⁶ Health Bill Deb 30 June 2011 col 146.

accountability to Parliament or the Courts. The Government's position was, the Minister explained, 'The Secretary of State is accountable to Parliament for the health service, and that is not altered one jot by the Bill'.³⁷ On this logic, the target duties within section 3(1) of the 2006 Act did nothing to the Secretary of State's accountability. The value of the scrutiny of this change in the Commons was that it challenged this reasoning, and forced the Government to concede that the situation was unclear.

On the legal accountability of the Secretary of State, the Minister explained that the Secretary of State would be subject to a claim for judicial review if he failed to carry out his statutory duty 'to exercise his functions so as to secure the provision of health services in accordance with this Act', and that he would no longer be subject to a claim for a failure to 'provide or secure the provision of services in accordance with this Act'.³⁸ As a result of the questions on the political and legal accountability of the Secretary of State for Health in the Commons, the Department of Health published a note explaining the consequences of changes to clause 1 of the NHS Act 2006 for the future role and functions of the Secretary of State for Health.³⁹

During the report stage, the Government made an important concession. Paul Burstow MP (Conservative), a Minister of State at the Department of Health, stated that the Government would be willing to make further

³⁷ Health Bill Deb 30 June 2011 col 144.

³⁸ Health Bill Deb 30 June 2011 cols 144-145.

³⁹ Department of Health, *Further information for legal professionals on clause 1 of the Health and Social Care Bill* (2011) paragraph 9.

amendments to the clause to put the Secretary of State's accountability for the NHS 'beyond legal doubt'.⁴⁰ The Bill then moved to the Lords.

4.2.2 The first report of the Constitution Committee

The Lords' first scrutiny of the Bill came in the form of a report of the Constitution Committee. The headline of the report was that the Bill risked 'diluting the Government's constitutional responsibilities with regard to the NHS'.⁴¹ The Committee argued that amendments 'may well be necessary' in order to preserve the substance of the accountability of the Secretary of State for Health.⁴²

The Committee based its conclusions upon an analysis of the NHS Act 2006. The report explained that in the Committee's view section 1 of the 2006 Act, which includes the duty to promote the comprehensive health service *and* the duty to provide or secure the provision of services, is linked to the duty in section 3(1) of the Act. This lists a number of specific duties that the Secretary of State must provide.⁴³ The authority for this claim is based upon the judgment of Lord Woolf in *R v North and East Devon Health Authority, ex parte Coughlan*.⁴⁴ The Committee claimed that the fact that in practice these duties are delegated is not important; what matters is that it is the *combination* of these provisions within the 2006 Act which

⁴⁰ HC Deb 7 September 2011 vol 532, col 404.

⁴¹ House of Lords Select Committee on the Constitution, *Health and Social Care Bill* (HL 2010-12, 197) para 4.

⁴² House of Lords Select Committee on the Constitution (n 41) para 5.

⁴³ House of Lords Select Committee on the Constitution (n 41) paras 7-8.

⁴⁴ [2001] QB 213.

makes the Secretary of State ‘constitutionally responsible for NHS provision in England’.⁴⁵

The Committee argued that clauses 1 and 10 of the Bill risked breaking the chain of duties and responsibilities established by the Court of Appeal in *Coughlan*.⁴⁶ Further, the Committee argued that clause 4 of the Bill, which imposed a new duty on the Secretary of State to promote autonomy, compounded this severance of the Secretary of State’s duties.⁴⁷ The Committee pointed out that there was a basic contradiction in the Government’s justification for clause 1(2)(b). The Department of Health claimed that the rewording would not affect the Secretary of State’s accountability for the Health Service, and yet the explanatory notes stated in clear terms that the Bill makes the NHS Commissioning Board, and not the Secretary of the State, responsible for commissioning and providing services.⁴⁸ The report concluded that the clauses within the Bill ‘pose an undue risk either that individual ministerial responsibility to Parliament will be diluted or that legal accountability to the courts will be fragmented’.⁴⁹ The proposed solution was to retain both the duty to provide and the duty to secure from the 2006 Act, as the Government’s reasoning did not justify why the changes within the Bill were needed.⁵⁰

⁴⁵ House of Lords Select Committee on the Constitution (n 41) para 10.

⁴⁶ House of Lords Select Committee on the Constitution (n 41) para 13.

⁴⁷ House of Lords Select Committee on the Constitution (n 41) para 14.

⁴⁸ House of Lords Select Committee on the Constitution (n 41) para 16.

⁴⁹ House of Lords Select Committee on the Constitution (n 41) para 18.

⁵⁰ House of Lords Select Committee on the Constitution (n 41) para 19.

The Government responded to the report in the form of a letter from the Minister in charge of the Bill in the Lords. It said:

The Government accepts that replacing the Secretary of State's duty to 'provide or secure the provision of services' with a duty 'to secure that services are provided' does alter the Secretary of State's political accountability in so much as he will no longer have a statutory duty to provide or commission services which is at present delegated to NHS bodies. This does not reduce the overall responsibility that the Secretary of State has for the NHS. The Secretary of State retains political accountability for the NHS and legal accountability for the statutory functions placed on him.⁵¹

The Government's argument was unchanged. The duty to provide within either section 1(2) or section 3(1) of the 2006 Act had no effect on the political accountability of the Secretary of State.

The Committee's intervention was notable for a number of reasons. Firstly, it marked a change in the nature of the debate on this aspect of the Bill. While the Opposition in the Commons referred to change in the accountability of the Secretary of State, no-one had explicitly identified the change as 'constitutional'. Secondly, the Committee considerably expanded the evidential basis for doubting the Government's claim that the change would not weaken the accountability of the Secretary of State. The Committee based their criticism on detailed analysis of the 2006 Act, and on how it been interpreted in the courts. Thirdly, despite the quality of their

⁵¹ Earl Howe, Letter to the Constitution Committee (10 October 2011).

analysis, the Committee remained hesitant to draw conclusions. The reason was that the case law cited did not conclusively show that sections 1 and 3 of the 2006 Act were critical to the accountability of the Secretary of State for Health.

4.2.3 Second reading in the House of Lords

The Constitution Committee's report featured prominently at second reading. The reason was that Lord Hennessy (Crossbench) and Lord Owen (Crossbench), who were not themselves members of the Committee, took the unusual step of tabling an amendment which would have committed the Bill to a special committee, following the precedent of the Constitutional Reform Act 2005. This would have had the specific task of examining the issues raised by the Constitution Committee's report.⁵² The debate also showed that the Government was committed to working with its critics in the Lords to preserve the existing accountability of the Secretary of State for Health.

When introducing the Bill, the Parliamentary Under-Secretary of State for the Department of Health, Earl Howe (Conservative), offered further detailed justification for clause 1. He argued that the legal situation that had regulated the accountability of the Secretary of State for Health since the National Health Service Act 1946 was not sustainable.⁵³ He explained that the Secretary of State's delegation of his duty to provide to the PCTs had resulted in an accountability deficit, because no mechanisms were

⁵² HL Deb 12 October 2011, vol 533, col 1716.

⁵³ HL Deb 11 October 2011, vol 533, col 1470.

developed to hold PCTs to account.⁵⁴ He attributed this failure to the ‘fiction’ that the Secretary of State is somehow responsible for all clinical decision-making in the NHS.⁵⁵ When speaking to the clause he explained that the Government had responded to the Constitution Committee’s report by letter, and had again indicated that they were willing to make amendments to put the matter ‘beyond doubt’.⁵⁶

The Lords saw marked change to the Government’s attitude to changing the relevant clauses. While Derek Twigg’s criticisms were met with strong rebuttals, in the Lords the accountability of the Secretary of State was treated as a technical question, which the Government was happy to resolve by collaboration. As a consequence, those scrutinising the Bill no longer had to get the Government to accept the danger of their proposals; instead they had the more technical task of debating the merits of how to draft amendments to remove the constitutional risk from the Bill.

The Government’s constructive attitude to the Lords was further evidenced within other contributions to the second reading debate. Lord Owen, who tabled the motion with Lord Hennessy to commit the Bill to a special committee to consider the issues raised by the Constitution Committee’s report, revealed that they had both been engaged in lengthy negotiations with Earl Howe.⁵⁷

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ HL Deb 11 October 2011, vol 533, col 1472.

⁵⁷ HL Deb 11 October 2011, vol 533, col 1496.

On the second day of the second reading Lord Hennessey put the case for a special committee, explaining that it would be capable of solving the problem by finding the right form of drafting.⁵⁸ A good number of peers spoke of their support for referral to a special committee, and this led the Minister to commit to host a meeting with all the peers interested in the accountability issue.⁵⁹ Just before the vote on the amendment, Lord Owen explained the rationale behind the referral. At the core of the case for referral was that the special committee would have Parliamentary Counsel at its disposal, which would facilitate the improvement of what was a complex legislative problem. Lord Owen's amendment was comfortably defeated by 330 to 262.

4.2.4 The committee stage in the House of Lords

On the first day of the committee stage, Baroness Williams of Crosby (Liberal Democrat), Baroness Jay of Paddington (Labour), Chairman of the Constitution Committee, and Lord Patel (Crossbench) moved an amendment which would include the wording from the 2006 Act, that the Secretary of State 'must provide or secure', in clause 1 of the Bill.⁶⁰ Baroness Williams set out a number of reasons for her amendment. First, it would make it absolutely clear that the Secretary of State's ultimate responsibility is not impaired.⁶¹ Secondly, it would retain the trust of the public, by ensuring there is no reduction in the ultimate powers of the

⁵⁸ HL Deb 12 October 2011, vol 533, col 1677.

⁵⁹ HL Deb 12 October 2011, vol 533, col 1705.

⁶⁰ HL Deb 25 October 2011, vol 731, col 727.

⁶¹ Ibid.

Secretary of State.⁶² Thirdly, it would ensure that Parliament could hold the Secretary of State to account for the vast sums of taxpayers' money spent on the NHS.⁶³ Williams referred to the alternative amendment tabled by Lord Mackay of Clashfern (Conservative), the former Lord Chancellor, and she confessed, 'I, for one, will not stick with the wording in mine if the Committee feels that another amendment more correctly reflects the concerns I have expressed'.⁶⁴ This captured the overall character of the negotiations. There appeared to be a genuine collaborative attitude towards finding a drafting solution to the problem identified by the Constitution Committee.

The alternative amendment moved by Lord Mackay of Clashfern stated: 'the Secretary of State (a) retains ultimate responsibility to Parliament for the provision of the health service in England'.⁶⁵ It retained the Government's wording 'to secure that services are provided in accordance with this Act' and did not re-introduce 'provide'.⁶⁶ This had the advantage of making clear that the Minister is accountable to Parliament but without creating a legal responsibility to provide.⁶⁷ In response, Baroness Jay of Paddington argued that the words of the 2006 Act 'to provide' were crucial to the Secretary of State's constitutional and legal responsibility.⁶⁸ She rehearsed the arguments of the report to claim that the removal of duty

⁶² HL Deb 25 October 2011, vol 731, col 728.

⁶³ Ibid.

⁶⁴ HL Deb 25 October 2011, vol 731, col 729.

⁶⁵ HL Deb 25 October 2011, vol 731, col 733.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

combined with the change to section 3 (1) of the 2006 Act would break the chain of legal responsibility.⁶⁹ Lord Mackay disagreed, claiming that the duty ‘to provide’ was not crucial to Lord Woolf’s judgment in *Coughlan* and that, instead, it was the duty to promote a comprehensive health service which was crucial to Lord Woolf’s chain of responsibility.⁷⁰ Lord Woolf’s judgment in the case did not actually make reference to the duty ‘to provide’; however, Lord Mackay did not address the consequential change to section 3 (1) of the 2006 Act, which would clearly break Lord Woolf’s chain of responsibility. Lord Hennessy agreed with Lord Mackay that it would be better for the statute to reflect the reality of the responsibilities, and therefore he favoured the inclusion of the ‘ultimate responsibility’ clause.⁷¹ In contrast, Lord Harris of Haringey (Labour) supported Baroness Williams’ proposal because ‘it is the more established approach’, and he expressed concern over the meaning of ‘ultimate responsibility’.⁷² Lord Owen argued that the House should not vote on this clause until they had considered the rest of the Bill, describing the committee process as an ‘education’ process.⁷³

When the committee stage resumed a week later, there was a noticeable increase in focus on the role of other clauses, particularly clauses 4 and 10, in changing the accountability of the Secretary of State for Health. Baroness Williams argued that clause 1 should be read with clauses 4 and 10, as the

⁶⁹ HL Deb 25 October 2011, vol 731, col 735.

⁷⁰ HL Deb 25 October 2011, vol 731, col 735.

⁷¹ HL Deb 25 October 2011, vol 731, col 740.

⁷² HL Deb 25 October 2011, vol 731, col 741.

⁷³ HL Deb 25 October 2011, vol 731, cols 742-743.

Constitution Committee had pointed out in its report.⁷⁴ She also implored the House not to push the amendments to a vote, as, if they were defeated, the issue could not be considered at the report stage which was when she hoped the change would be made.⁷⁵ Lord Marks of Henley-on-Thames (Liberal Democrat) argued that special attention should be paid to clause 10, which transferred the specific duties from the Secretary of State to the commissioning board, whatever solution was found to the problem in clause 1.⁷⁶ The Government Minister, Earl Howe, indicated that he was willing to work with the authors of the amendments, the Constitution Committee and other interested peers, to draw up a solution before the report stage.⁷⁷

4.2.5 The second report of the Constitution Committee

On 20 December, between the end of the committee stage and the start of the report stage, the Constitution Committee published its second report on the Bill.⁷⁸ The report was the product of the Committee's negotiations with the Government over the Secretary of State's responsibility for the NHS.⁷⁹ A series of meetings were held between the Committee and the Government, and as a result the Committee proposed three recommendations for amendments in their second report. The Committee's ability to re-enter the debate after the committee stage was central to

⁷⁴ HL Deb 2 November 2011, vol 731, col 1238.

⁷⁵ Ibid.

⁷⁶ HL Deb 2 November 2011, vol 731, col 1245.

⁷⁷ HL Deb 2 November 2011, vol 731, cols 1240-1241.

⁷⁸ House of Lords Select Committee on the Constitution, *Health and Social Care Bill: Follow up* (HL 2010-12, 240).

⁷⁹ N Timmins, *Never Again? The Story of the Health and Social Care Act 2012* (London: Institute for Government and The King's Fund, 2012) 117.

maintaining the relevance of constitutional interpretation to the debate on the Bill.

The first proposed amendment was that the Bill should include a new subsection, which stated that the ‘Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England’.⁸⁰ The Committee explained that the clause was designed to ensure that ministerial responsibility to Parliament was maintained but without allowing ‘political micro-management’, which the Government feared ‘to provide’ would allow. The report also noted that its solution was similar to that suggested by Lord Mackay of Clashfern during the Committee stage. However, the Committee explained that ‘ministerial responsibility’ was preferable to the term ‘ultimate responsibility’ used by the former Lord Chancellor.⁸¹ The clause proposed was an example of what this thesis has termed a ‘constitutional protection clause’. A constitutional protection clause is a provision expressly designed to protect a constitutional norm. This particular clause was expressly designed to protect the Secretary of State for Health’s ministerial responsibility for the NHS. The report included an appendix which sets out the Committee’s understanding of the constitutional convention of ministerial responsibility.⁸² The convention has changed considerably over time, and the report’s explanation is significant in the context of the proposed codification of the convention in the report. Appendix 1 explained that there

⁸⁰ House of Lords Select Committee on the Constitution (n 78) para 8.

⁸¹ House of Lords Select Committee on the Constitution (n 78) para 7.

⁸² House of Lords Select Committee on the Constitution (n 78) Appendix 1.

is a difference between what a Minister is constitutionally responsible for and what the Minister actually does on a day-to-day basis. It explained, ‘it is because of a failure to bear this distinction in mind that much of the confusion about this matter has arisen’.⁸³ The basic point was that many parliamentarians did not appreciate the nature of the relationship between the statutory duty and the convention.

The proposed changes to clause 4 and clause 20 addressed the issue of the Secretary of State’s parliamentary and legal accountability. The changes proposed aimed to ensure that the duty to promote autonomy would not dilute the Secretary of State’s ministerial responsibility to Parliament or his duty to secure the provision of services.⁸⁴ They would have made the duty subject to section 1 of the 2006 Act and replaced the requirement to promote autonomy with the words ‘... have regard to the desirability of securing ...’.⁸⁵ The third proposed amendment was to clause 10, which would make the proposed Clinical Commissioning Groups subject to a duty to promote a comprehensive health service, which would ensure that the chain of accountability in *Coughlan*, between section 1(1) and the provision of service would be re-established.

⁸³ House of Lords Select Committee on the Constitution (n 78) para 5.

⁸⁴ House of Lords Select Committee on the Constitution (n 78) para 9.

⁸⁵ Ibid.

4.2.6 The report stage in the House of Lords

During the report stage Earl Howe moved an amendment, which after Royal Assent would become part 1 section (1)(3) of the Health and Social Care Act 2012. It read:

The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.⁸⁶

Earl Howe confirmed that this amendment was the product of the meetings with the Constitution Committee. He added that the scrutiny of this aspect of the Bill had ‘revealed the House of Lords at its best’.⁸⁷ Baroness Jay spoke after the Minister and opened her speech by saying ‘this is not really a government amendment but an amendment by the Constitution Committee’.⁸⁸ Those familiar with the House of Lords will recognise the significance of this remark. In most cases the best a peer moving an amendment can hope for is that the Government will accept the principle behind an amendment and then return with an amendment of its own drafting. That the Committee was directly involved in the process of drafting the amendment is extremely important, not just symbolically but also instrumentally, as it is doubtful that without its involvement the Government amendment would have reflected the Committee’s constitutional interpretation to the same degree. Baroness Jay’s speech also revealed to the House that it was the Committee’s legal advisers, Professor Richard Rawlings and Professor Adam Tomkins, who had formulated a range of legislative solutions; these were put to the Committee, and the

⁸⁶ HL Deb 8 February 2012, vol 735, col 298.

⁸⁷ Ibid.

⁸⁸ HL Deb 8 February 2012, vol 735, col 299.

Committee had agreed to the amendment before it. The Government later moved another amendment to clause 4 of the Bill, which closely resembled that suggested by the Committee.⁸⁹ Unlike in the case of the first amendment, Baroness Jay did not put her name to this amendment, because the wording is not exactly as the Committee proposed.⁹⁰ The second day of the report stage saw a version of the Committee's third proposed amendment moved by the Government.⁹¹ In summary, all three of the Committee's proposals in its second report were acted upon, and the most important amendment was included precisely as the Constitution Committee drafted it.

Conclusion

At first sight, the debate on the proposed change to the Secretary of State for Health's accountability appears to be a model of how parliamentary constitutional interpretation should contribute to the parliamentary legislative process. The Constitution Committee played a decisive role, leading the Lords' deliberation on the Bill's constitutional effect, which eventually resulted in an amendment that protected a constitutional principle. On closer inspection, the role of constitutional interpretation was more complicated than this simplified narrative would indicate. A number of factors influenced the character of the practice and affected the nature of the contribution it made to the legislative process.

⁸⁹ HL Deb 8 February 2012, vol 735, col 341.

⁹⁰ HL Deb 8 February 2012, vol 735, col 344.

⁹¹ HL Deb 8 February 2012, vol 735, col 658.

In contrast to the Public Bodies Bill, constitutional interpretation was employed by MPs in the debate on the Bill in the House of Commons. The opposition identified that the change to the accountability scheme in the Bill was significant, and put a number of arguments that made use of constitutional interpretation to challenge the Government's justification of the change to the 2006 Act. The probing amendment moved by Derek Twigg MP to insert 'and is accountable to Parliament for' into clause 1 was very close to the eventual solution drafted by the Constitution Committee and accepted by the Government. The main benefit of the use of constitutional interpretation in the public bill committee was that it prompted the Government to develop a more robust defence of the proposals, which in turn served to clarify its position on the Bill and the constitutional effect of the Bill. The Government revealed that it held a problematic position: that it was committed to a change that was inconsequential. This begged the question: if it did not matter, then why were they so keen to change it? It did not add up and served to provide reasoning with which the Lords and the Constitution Committee could engage. This shows that constitutional interpretation, even without the prospect of immediate or directly resultant amendment, can be of value. By the time the Bill was near to leaving the Commons, the Government appeared willing to concede that significant amendments might be needed to put the issue beyond doubt. The lack of significant change to clauses with constitutional effect in the Commons was not due to the absence of constitutional interpretation or well-crafted amendments, it was simply that the Government was not prepared to be as constructive in the Commons as

it was in the Lords.⁹² The arguments advanced by Derek Twigg MP may not have featured the same level of constitutional reasoning as those in the Lords, but the basic analysis was the same – the crucial difference was the Government’s change in attitude.

The use of parliamentary constitutional interpretation in the debate on this Bill emphasised that one of its primary qualities was that it enabled parliamentarians to engage in deliberation on aspects of a Bill that were constitutionally significant, but might otherwise be overlooked. If parliamentarians had not identified within the debate that the scheme would impact on the way that a rule of the constitution operates, then the Government would not have justified, in such detail, why clause 1 of the Bill was changing this rule. The use of parliamentary constitutional interpretation prompted the Government to give reasons to justify the impact of the clause, which were then subject to further debate and scrutiny during the debate. This shows that a significant benefit of the use of constitutional interpretation in this case was that it prompted the Government to develop its justification for altering the accountability scheme in the NHS Act 2006, which had been on the statute book for more than 50 years. This reasoning was examined and found to be deficient by many parliamentarians, leading to the negotiations in the Lords on how the clause could be improved, which ultimately led to a change in the Bill. The reality of legislative drafting is that Ministers are often not responsible for

⁹² Timmins (n 79) 95.

many of the drafting decisions made,⁹³ and one of the purposes of the legislative process is to ensure that the Government is nonetheless held to account for those choices. Parliamentary constitutional interpretation provides a framework for examining legislation that looks beyond the main policy issues within a Bill, and enables parliamentarians to hold Government to account for the effect that the Bill might have on the existing norms within the constitution. If the legislative process is working well and if the conditions of the existing constitution are valued, then a proposed provision with constitutional effect should at the least prompt the Minister to consult with the Bill team and make public the thinking behind the change. Constitutional interpretation can ensure that a ‘technical’ element of the Bill, which may have constitutional effect, receives the same level of justification as the elements of the Bill that relate to the substance of the policy.⁹⁴ In this sense the value of the practice is that it supplies a supplementary angle of disagreement and challenge, prompting the Government to reveal why it intends to make a change to the law that will have an effect upon the constitution.⁹⁵ When a Bill is not of first class constitutional importance this is especially worthwhile, because the constitutional effect might otherwise go unnoticed.

Another aspect of the practice is that it appears to facilitate the construction of constitutional protection clauses. The deliberations on how to codify ministerial responsibility in the Lords showed that peers’ understanding of

⁹³ D Greenberg, *Laying Down the Law* (Sweet & Maxwell 2011) 54-63.

⁹⁴ Greenberg (n 93) 49.

⁹⁵ Ibid.

the principle could directly inform the process of drafting. The parliamentary constitutional interpretation was, in effect, directly responsible for the statutory recognition of the convention of individual ministerial responsibility.⁹⁶ That is important, because it allows parliamentarians to make a direct contribution to the content of the constitution.

A distinctive feature of the constitutional interpretation during the debate on this Bill, certainly in contrast to the Public Bodies Bill, was the uncertainty and complexity that surrounded the norms that were all subject to interpretation. While the practice ensured that the reasons for the change to the NHS 2006 Act were developed and questioned, the use of constitutional interpretation also revealed that the Government and parliamentarians were themselves unsure of the meaning and implications of individual ministerial responsibility and the effect that the accountability scheme in the NHS Act 2006 had upon it. In one sense the value of the practice, and particularly the interventions of Derek Twigg MP and the Constitution Committee, was to show that there was a problem over the clarity of the accountability of the Secretary of State for Health that needed to be resolved. These challenges pointed the Government to the fact that the constitutional effect of the Bill was not as clear as it should be. However, the cause of the problem was not so much the Bill, but rather the provisions within the Act that were subject to change.

⁹⁶ Davies (n 6) 575

The complexity and uncertainty that characterised the analysis of the constitutional effect of the Bill can partly be attributed to the lack of parliamentary justification of the scheme during the passage of previous NHS legislation. The NHS Act 2006 was a consolidating act, and so the accountability scheme was not scrutinised. The only parliamentary scrutiny of the scheme occurred during the passage of the National Health Service Act 1946, and even then there was not much parliamentary time devoted to it. Had the scheme been subject to sustained scrutiny and parliamentary constitutional interpretation during the passage of the NHS Act in 2006, there would have been much better opportunity to develop effective arguments to scrutinise the changes proposed in this new Bill. Parliamentarians' ability to interpret effectively the constitutional norms within existing legislation is enhanced when that existing legislation has been debated thoroughly at the time it was originally enacted. In other words, the interpretability of the Act is not just a product of the drafting but also of the debate that precedes enactment.⁹⁷

The other major difficulty for parliamentarians was the complexity of the constitutional norms that the Bill engaged. Sections 1 and 3 of the NHS Act 2006 are an intricate alteration to the constitutionally significant relationship between the Secretary of State for Health, Parliament and the National Health Service. The accountability scheme contains a number of different elements, each of which is complex in its own right. The target duties within the NHS Act 2006 served a symbolic and aspirational purpose that was

⁹⁷ See Chapter 6.

difficult to define. Even though the scheme appeared to be aimed at parliamentarians, in the sense that they were supposed to use the duty to provide to hold the Secretary of State to account, there was little in the way of tangible political effect that could be pointed to. Further the words ‘to provide’ were far from clear, in the sense that the plain meaning of the words revealed little.⁹⁸ If a statute is not meant to be enforced by courts but instead is intended to communicate a declaratory protection of a principle, then surely it should prioritise clarity in order to maximise its ability to influence the political process. In the absence of a codified constitution, it can be difficult for Parliament and drafters to communicate how and why a particular provision should be understood as having a distinct constitutional effect. Nevertheless, the duty to provide certain services did add a degree of normative certainty to the precise terms of the Secretary of State’s political accountability. That this was missed in the debate is not a criticism of parliamentarians, but rather it is a criticism of the transparency of the original scheme. If the authors regarded the original scheme as important, then more should have been done to communicate, both through the law and parliamentary debate, its purpose and its relationship with the convention of individual ministerial responsibility. If the law had been clearer and subject to more intense scrutiny, then the constitutional interpretation during this debate on this Bill would have been able to do more to justify the change. This Act will not suffer from the same weakness. Future Parliaments will be able to benefit from this Act’s constitutional protection clause, section 1 (3), which was preceded by a parliamentary debate that clearly communicated

⁹⁸ WJM Voermans, ‘Styles of Legislation and Their Effects’ (2011) 32 Statute Law Review 38, 40.

its purpose to ensure that ‘the Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England’.

5. The Fixed-term Parliaments Bill

This enactment represents constitution-making at its worst.¹

Rodney Brazier

The Fixed-term Parliaments Bill is a prime example of a Bill of first class constitutional importance.² It follows that the committee stage of the Bill was taken on the floor of the House of Commons. The Bill, although made up of only a handful of clauses, was loaded with far-reaching constitutional intent to alter constitutional norms that were central to the regulation of Parliament for generations. Constitutional change of this importance creates expectations in a constitutional democracy, namely that the process will be treated with special care. Yet for many the Government did not approach the enactment of this Bill in a way that met those expectations, as Brazier's quotation above indicates.³ This presented a major challenge for parliamentarians. Those engaged in the scrutiny of the Bill had to overcome the problems caused by the Government's approach, namely that when the Bill was introduced to Parliament they did not present a well-developed case for some of the main clauses in the Bill. This chapter charts the role played by constitutional interpretation in the response to this challenge of constitutional change in difficult circumstances. The aims of this chapter are

¹ R Brazier, 'A small piece of constitution history' (2012) 128 Law Quarterly Review 315, 315.

² M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 566.

³ House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (HL 2010-12, 177); or in theoretical terms see: D Lutz, 'Towards a Theory of Constitutional Amendment' (1994) 88 American Political Science Review 355.

the same as in the two previous case studies: to identify the main examples of the practice during the debate on the Bill, to critically analyse the normative components of those examples, and to evaluate the nature of the contribution that the practice made to the parliamentary process and to the constitution.

The Fixed-term Parliaments Bill sought to remove the Prime Minister's power to recommend the date of a general election to the Monarch. The Bill extinguished the Monarch's prerogative power to set the date and replaced it with a system of fixed-term five-year Parliaments. The Fixed-term Parliaments Bill was the fourth time that a Government had attempted to alter the statutory regulation of the length of a Parliament since the passage of the Bill of Rights in 1689.⁴ Despite representing a major change to the laws and conventions that regulate the duration of Parliaments, the Government sought to represent the Fixed-term Parliaments Bill as being in keeping with the substance of the very constitutional norms that the Bill sought to change. This claim was central to their justification for the Bill, which they argued was based on principle rather than pragmatism. Unsurprisingly the Coalition Government resisted any suggestion that the Bill sought to change the terms of the constitution to suit the Government's own interests.

⁴ The Triennial Act 1693, the Septennial Act 1715 and the Parliament Act 1911.

5.1 The constitutional framework of the Bill

The Fixed-term Parliaments Bill contained new constitutional norms and sought to repeal significant constitutional norms. This is one of the reasons why it qualified as a Bill of ‘first class constitutional importance’.⁵ So while the two previous case studies examined the role of constitutional interpretation during the debate on Bills that had constitutional effect, by contrast this Bill’s main purpose was constitutional change. This added an extra dimension to the constitutional framework. It was not simply a question of assessing how the clauses in the Bill would affect existing constitutional norms, but it also involved analysing how the clauses would operate in relation to each other, and in the abstract this was far from straightforward. Furthermore, the subject of regulation, Parliament itself, added a further degree of complexity. As a consequence, despite its brevity and the simplicity of its form, the Fixed-term Parliaments Bill inhabited a complex framework of constitutional norms. This section sets out the Bill as introduced and provides an analysis of the constitutional norms that were relevant to the Bill.

The unusual origins of this proposal for constitutional change are key to understanding the parliamentary debate on its content. The Bill was not a manifesto commitment, instead it was the product of the negotiations between the Conservative Party and the Liberal Democrats which led to the formation of the Coalition Government after the 2010 general election. These negotiations are described by David Laws MP (Liberal Democrat), in

⁵ Jack and May (n 2) 566.

his book on the formation of the Coalition: *22 Days in May*.⁶ His account explains the origins of some of the key constitutional norms within the Bill. Laws describes how they arrived at five-year terms:

George Osborne made the point that five-year Parliaments were better, as they allowed governments to get into implanting their plans before having to start worrying about the timing of the electoral cycle.⁷

This created a problem for the Government. The Bill appeared to be the product of a political deal, rather than a well-justified constitutional reform. The only way for the Government to rebut such claims would be to point to reasons for introducing fixed-term Parliaments that were not also reasons that this particular Coalition government might want fixed-term Parliaments.

Fixed-term Parliaments had been regularly proposed by campaigners for political reform. In 1992 the codified constitution produced by the Institute for Public Policy Research and the Liberal Democrats contained a proposal for fixed-terms.⁸ In 2001 the former Labour MP Tony Wright introduced a private members bill providing for four-year fixed-terms.⁹ The Liberal Democrats have long been in favour of fixed-term Parliaments, and at their 2007 Party conference a policy paper arguing for four-year fixed-terms was adopted.¹⁰ In October 2007, the then Liberal Democrat MP David Howarth

⁶ D Laws, *22 Days in May* (Biteback 2010).

⁷ Laws (n 6) 98.

⁸ IPPR, *A Written Constitution for the United Kingdom* (IPPR 1993).

⁹ The Fixed-term Parliaments Bill HC Bill (2001-02) [134].

¹⁰ Liberal Democrats, *For the People, By the People* Autumn 2007 9.

introduced a Private Members Bill providing for four-year fixed-terms.¹¹

The Labour Party manifesto for the 2010 election contained a pledge to create fixed-term parliaments.¹²

The weaknesses of the Government's approach soon became apparent when it set out its initial proposal for early dissolution. In May 2010 the Government said the Bill would 'provide for dissolution if 55% or more of the House votes in favour'.¹³ Laws explained how this norm was produced:

After some work on Ed Llewellyn's calculator, and consideration of the by-election risks, it was decided that a 55% vote of MPs would be required to provide for a dissolution. This was just greater than the combined opposition and Lib Dem parliamentary parties, thereby safeguarding the Conservative position.¹⁴

When Parliament resumed, the proposals were subject to fierce criticisms within the House of Commons. Typical of these was this question from David Winnick MP (Labour) to the Prime Minister:

Does the right hon. Gentleman realise that the proposal for a 55% rule to prolong the life of this Parliament is totally unacceptable? It is a travesty of parliamentary democracy, and if it goes ahead we will see what the 2010 House of Commons is made of.¹⁵

¹¹ Fixed-term Parliaments Bill HC Bill (2006-027) [157].

¹² Labour Party, *The Labour Party Manifesto 2010: A Future Fair for All* (2010) 9:3.

¹³ Cabinet Office, *The Coalition; Our Programme for Government* (2010) 26.

¹⁴ Laws (n 6) 184.

¹⁵ HC Deb 25 May 2010, vol 510, cols 135-153.

It was not just the Labour party who were critical. David Davis MP (Conservative) and a former member of the Shadow Cabinet, said in a letter to the Daily Telegraph:

The requirement for a 55 per cent majority to dissolve parliament, and thereby dismiss a government, dramatically reduces the ability of Parliament to hold the executive to account. It is a major constitutional change, possibly one of the greatest since 1911.¹⁶

These criticisms appeared to make a major impact because on 5 July Nick Clegg MP (Liberal Democrat), the Deputy Prime Minister, announced that the Coalition Government had revised and clarified its proposals and that instead a majority of two thirds would be needed to dissolve Parliament.¹⁷ Votes of no confidence would continue to require only a simple majority. Even though the Bill was not subject to pre-legislative scrutiny, it appeared that the arguments against the original proposals within Parliament had in part contributed to the shape of the Bill even before it was introduced. While in one sense it was positive that the Government accepted that it was not constitutionally acceptable to introduce a constitutional provision that was so nakedly based on its own specific short-term interests, the main impression from the episode was that the proposal needed pre-legislative scrutiny.

¹⁶ David Davis MP, 'Why limiting MP powers damages the monarchy' *Daily Telegraph* (18 May 2010).

¹⁷ HC Deb 5 July 2010, vol 513, col 24.

5.1.1 The Bill as introduced to the House of Commons

The Bill was made up of five clauses, of which the first two were the most significant.¹⁸ Clause 1 created a new constitutional norm that Parliaments should, subject to exceptions, last for a fixed-term of five-years. Clause 1(2) set the date for the next general election, 7 May 2015, and clause 1(3) stated that subsequent general elections would be held on the first Thursday in May in the fifth calendar year following that in which the last general election took place. The other significant sub-section was clause 1(5), which gave the Prime Minister a power to change the date of the election by two months either side. The Prime Minister's order would be subject to the affirmative procedure, and therefore would have to be approved by both Houses of Parliament. This clause was important for the passage of the Bill because it meant that the Bill was caught by section 2(1) of the Parliament Acts 1911 and 1949, as it would potentially extend the duration of a Parliament beyond five years. This meant that the House of Lords could have vetoed the Bill, and it could not have been passed by the special procedure within the Parliament Acts. This added a further element to this Bill's interaction with the norms of the constitution.

Clause 2 provided for two statutory procedures for bringing about an early general election. Clause 2(1) proposed to introduce entirely new means by which the House of Commons can bring about a general election. The clause would mean that if the House of Commons passed a motion 'that there should be an early parliamentary general election', which was then

¹⁸ The Fixed-term Parliaments Bill HC Bill (2010-12) [64].

certified by the Speaker as being passed by two thirds (or greater) of the number of seats in the House, a general election would be called. The proposal was novel because it was the first time a Government Bill had proposed to introduce a special majority parliamentary procedure.¹⁹

Clause 2(2) codified and altered the no confidence procedure. Under this new procedure, an early general election would be held if the Speaker of the House of Commons issued a certificate that the House of Commons passed a motion of no confidence in the Government on a specified day, and that since that day 14 days had passed without the House passing a motion of confidence in the Government. Clause 2(3) was an ouster clause. It said that the Speaker's certificate, which applies to both mechanisms, is 'conclusive for all purposes'.

A central feature of the Bill was the inter-relationship between the provisions in clauses 1 and 2. For example the impact of clause 1 was dependent on the level of flexibility created by clause 2. If clause 2 did not create an effective restriction on the Government's ability to trigger an election then the value of clause 1 would be reduced. In addition the significance of clause 2(1) needed to be understood in the light of clause 2(2). This posed a major challenge for those engaged in the scrutiny of the Bill because the examination of the constitutional implications of this Bill

¹⁹ The only other voting requirement other than a simple majority is set out in Standing Order No 37, which requires 'no fewer than one hundred Members voted in the majority'. See House of Commons, *Standing Orders of the House of Commons – Public Business (2010) New Parliament*, April 2010, HC 539 2009-10, Standard Order No 37.

was not just a question of applying external standards to the Bill, which is difficult enough. It also required scrutinising the proposed constitutional norms within the Bill against each other, and this represented a challenge because the legislative process is structured so that each clause is considered in turn, and this made it difficult to scrutinise the relationship between different provisions.

5.1.2 The duration of a Parliament

The Fixed-term Parliaments Bill engaged with a range of existing constitutional norms. A mixture of statute, principle and convention regulated the duration of a Parliament and was therefore relevant to the clauses in the Bill, and this mixture added a degree of complexity to the evaluation of the constitutional effect of the Bill.

The Fixed-term Parliaments Bill proposed to repeal the Septennial Act 1715, as amended by the Parliament Act 1911, a significant constitutional statute, which reads:

That this present Parliament, and all Parliaments that shall at any time hereafter be called, assembled, or held, shall and may respectively have continuance for five-years and no longer.

The 1715 Act set a time limit on the Prime Minister's power to dissolve Parliament at the date of his choosing. The Act prescribed the outer limits of both the Government and Parliament's discretion by setting a maximum length of time that a Parliament could last.

The 1715 Act was originally enacted to extend the maximum length of Parliament. The Triennial Act 1694 had set the limit at three years, and the 1715 Act extended it to seven. Dicey described it as the ‘most significant single statute’ for the purposes of demonstrating the theory and practice of parliamentary sovereignty.²⁰ The 1715 Act showed that Parliament’s legislative capacity was not limited by its own enactments or by democracy. The fact that the electorate has elected a three-year Parliament did not prevent Parliament deciding that it wanted to extend its own authority.

Section 7 of the Parliament Act 1911 amended the Septennial Act 1715 to set the maximum duration of a Parliament at five years.²¹ The 1911 Act also removed the Lords veto over ordinary legislation and replaced it with a delaying power of two years for ordinary bills. The significance of the change to the Septennial Act is sometimes overlooked, but it was a key part of that package of constitutional reform.²² The logic of the change was that shorter Parliaments would increase the power of suspensory veto over Government legislation, and would therefore mitigate the increase of the Commons’ legislative power.²³

During the parliamentary debate on the Parliament Act 1911, the Government indicated that it was not intended to result in five-year

²⁰ AV Dicey, *Introduction to the study of the law of the constitution* (Liberty Fund 1914) 6.

²¹ C Ballinger, ‘Hedging and Ditching: The Parliament Act 1911’ (2011) 30 *Parliamentary History* 19, 21.

²² *Ibid.*

²³ R Blackburn, *The meeting of Parliament: a study of the law and practice relating to the frequency and duration of the United Kingdom Parliament* (Dartmouth 1990) 22.

Parliaments per se, but rather to set five years as the maximum length. The point is clearly evident from two contributions to the parliamentary debate on the Bill made by the then Prime Minister, Herbert Asquith. The first is from his speech made when introducing the Bill to the House of Commons for second reading:

... we propose to shorten the legal duration of Parliament from seven to five years, which will probably amount in practice to an actual legislative working term of four years. That will secure that your House of Commons, for the time being, is always either fresh from the polls which gave it authority, or – and this is an equally effective check upon acting in confidence of the popular will – it is looking forward to the polls at which it will have to render an account of its stewardship.²⁴

The second is from a speech given by Asquith during the committee stage in the Commons:

As to the duration of Parliament, if there were quinquennial Parliaments, I have always said that a Parliament would not last more than four out of the five years.²⁵

Despite the Prime Minister's position, the legal reality was that what the Government in 1911 intended in terms of the precise length of a Parliament was not important. Under the system of a statutory *maximum*, the power of dissolution was effectively in the hands of the Prime Minister, which meant that the precise time frame was not possible to predict. Parliaments could, and did, last any time up to five years. The 1911 Act preserved the norm

²⁴ HC Deb 21 February 1911, vol 21, col 1749.

²⁵ HC Deb 1 May 1911, vol 25, col 85.

that the length of time would be a maximum. This obviated the need to debate the existing system. Thus in 1911, the Government was able to make a significant change to the constitution, in changing the maximum duration of Parliament, without significant parliamentary challenge. The problem is that without much challenge, the Government of the day did not develop its justification for the five-year statutory maximum. As Blackburn notes ‘a striking feature of the very protracted and lengthy debates attendant on the parliamentary passage of the Bill is that there was hardly any discussion at all on the limitation of the duration of Parliaments’.²⁶ Had it been enacted separately, there would have more understanding of the advantages of a five-year maximum, and this debate could have informed and enhanced the debate on the proposal to repeal it.

The defining feature of the system, which operated until 2011, was that it gave the Prime Minister the power to decide the date of the election and therefore determine the length of a Parliament. In law it was the Queen who called a general election, as the Monarch was vested with the legal power to dissolve and summon Parliament.²⁷ The prerogative was not derived from any constitutional or parliamentary document, but from judicial recognition of activities of the Crown over past centuries.²⁸ The legal basis of the power was the common law. However, by convention the Monarch’s legal power to dissolve was exercised in accordance with the advice of the Prime

²⁶ Blackburn, *The meeting of Parliament: a study of the law and practice relating to the frequency and duration of the United Kingdom Parliament* (n 23) 22.

²⁷ R Blackburn, *The electoral system in Britain* (Macmillan 1995) 18.

²⁸ Blackburn, *The electoral system in Britain* (n 27) 19.

Minister. The Prime Minister never allowed Parliament to run to its statutory maximum, and always chose to exercise the power to call an election before the expiry of the five-year period.

The main restriction on the Prime Minister's discretionary power to call an election under the old system was through the confidence procedure. A central principle of the British system of parliamentary democracy is that the Government of the day must command the confidence of the House of Commons. The confidence procedure in the House of Commons, a convention, was a product of this principle. Confidence motions could be triggered by the Government, to test their support, but also by the Official Opposition. According to Blackburn, the procedure was part of the convention of collective ministerial responsibility.²⁹ If the Government lost a vote of confidence or if a motion of no confidence was carried, this would send a message to the Prime Minister that a majority of the Commons did not support the Government. Therefore without any prospect of implementing its legislative programme, the Government could not continue.

Despite the procedure's importance, there was little certainty over the precise content of the rules on the form and applicability of confidence motions in Parliament. Understanding developed by convention, rather than through statute or the Standing Orders of the House. The clearest element of the convention was that the Government should find time for the debate of

²⁹ Ibid.

motions of confidence or no confidence. Erskine May described the convention in the following terms:

From time to time the Opposition puts down a motion on the paper expressing lack of confidence in the Government or otherwise criticising its general conduct. By established convention the Government always accedes to the demand from the leader of the opposition to allot a day for the discussion of a motion tabled by the official opposition which, in the Government's view, would have the effect of testing the confidence of the House.³⁰

The convention did not specify the form of words for censure motions and in practice they have taken a number of different forms. The convention did not dictate the specific consequences of losing a confidence motion. Although in reality there were only two options for a Prime Minister after a vote of no confidence had been carried, they could either resign or advise a dissolution.

The convention of the confidence procedure was defined by its flexibility. The Government claimed that it did not intend the Fixed-Term Parliaments Bill to alter the substance of the procedure; however, it seemed inevitable that to transplant the existing procedure into the context of statutory fixed-terms would result in some significant changes to the form and substance of the norm.

³⁰ Jack and May (n 2) 344.

5.2 The parliamentary debate

This section identifies and critically analyses the key examples of parliamentary constitutional interpretation during the debate on the Fixed-term Parliaments Bill. The aims of this section are to highlight how parliamentarians interpreted the norms that made up the Bill's constitutional framework, and to evaluate the contribution that the examples covered made to the passage of the Bill through Parliament and to the constitution. The complexity of this short Bill's constitutional framework meant that those engaged in scrutiny of the Bill had a number of normative elements to consider. Firstly, to understand the Bill required a good grasp of the elements of the constitution that the Bill sought to change. Secondly, evaluating the Bill required analysis of the relationship between the different elements within the Bill, and understanding of the relationship between the Bill itself and the elements of the constitution that would affect how the Bill would operate. The general point is that it is difficult to evaluate how a particular constitutional change will fit within the wider constitution. Further, this difficulty can be exacerbated when the purpose and content of key elements of the constitutional framework are not easily accessible.

For reasons of space, this account of the parliamentary passage of the Bill is highly selective. Much of the debate engaged in constitutional interpretation, but the focus here is on three particular debates: on entrenching fixed-terms within the constitution; on Asquith's intention; and on the Speaker's certificates. The account here does not cover a number of

the important constitutional issues debated by Parliament. For example, it excludes scrutiny of the Government's approach to the process of constitutional reform. Parliament's criticism in this case was particularly fierce and frequent, and it is worth quoting one of the most significant criticisms to highlight the context in which the normative debates took place, when the first parliamentary committee to report on the Bill said:

The Fixed-term Parliaments Bill is ill-thought through, rushed and does not appear to provide a satisfactory solution, which ideally should be one around which there can be political consensus. It is unacceptable that a Bill of this legal and constitutional complexity has not been the subject of any prior consultation or pre-legislative scrutiny.³¹

Although it took over a year to complete its parliamentary stages and receive Royal Assent, the failure to consult at the pre-legislative stage had consequences for the nature of the constitutional interpretation during the debate. The speed limited the Government's ability to develop its justification for the Bill, while the failure to think through much of the detail in the Bill at the outset changed the nature of the task facing those parliamentarians intent on scrutinising the constitutional effect of the Bill.

5.2.1 Entrenching fixed parliamentary terms within the constitution

The Government flatly denied that the Fixed-term Parliaments Bill had anything to do with the insecurities of coalition. Instead the Government stated that the aims of the Bill were two-fold: firstly, to remove the Prime

³¹ House of Lords Select Committee on the Constitution, *Fixed-term Parliaments Bill* (HL 2010-12 69) para 5.

Minister's power to decide upon the election date, and, secondly, to make fixed-term Parliaments part of 'our constitutional arrangements'.³² The proposal to use statute to regulate, with considerable precision, the dissolution of Parliament raised key questions over Parliament's legislative capacity and the principle of parliamentary sovereignty. As Ryan explains, if Parliament is legally supreme, it is not legally possible to legislate for fixed parliamentary terms.³³ Parliamentary sovereignty means that the Government of the day could always legislate to bring about an early election in order to get around the terms of any Act providing for a fixed term. At the same time, the Government maintained that there was nothing extraordinary about the aims of the provisions of the Bill, or in its words: 'all Parliaments legislate for the future'.³⁴ The questions for Parliament were: whether there was anything different about this Bill? And how would it affect the legislative capacity of future Parliaments? These are questions that get to the heart of debates surrounding the changing nature of the constitution, as they demand analysis of the extent to which statutory constitutional law can in practice limit the discretion of future Parliaments.

In the House of Commons, the Government was pressurised by Conservative backbenchers who questioned why it was seeking to legislate for fixed terms. They argued that the aims of the Bill could be achieved through standing orders, which would not have the same risks of justiciability. In response the Government justified the use of statute by

³² Mark Harper MP (Conservative) HC Deb 13 July 2011, vol 531, col 361.

³³ M Ryan, 'The Fixed-term Parliaments Act 2011' [2012] Public Law 213, 215.

³⁴ HC Deb 13 July 2011, vol 531, col 361.

explaining the importance of the legal or constitutional effect of primary legislation in achieving the aims of the Bill:

We think that putting the provisions in legislation is preferable to putting it in Standing Orders because the Government then have to get the Bill through both Houses of Parliament, in one of which they do not have a majority.³⁵

This statement indicates that the Fixed-term Parliaments Bill was in part designed to make it difficult for future Governments and Parliaments to alter the arrangements for the dissolution of Parliament. By creating a system for setting the date of general elections whereby more of the rules are contained in statute than was strictly necessary, the Government deliberately aimed to make it more difficult for subsequent Governments (and Parliaments) to alter the normative system that it had designed.³⁶ The legal status of the norms represented a key part of the Government's plan, even though they were explicitly designed to be non-justiciable. This seemed to be in tension with the Government's other argument that the Bill's impact on future Parliaments was no different to any other Act. The problem with this analysis is that very few Acts prescribe a normative framework which Parliament itself must obey. The Government did not seem prepared to acknowledge that the Bill, by prescribing the statutory regulation for how Parliament should act, would affect the legislative capacity of Parliament differently than 'ordinary' legislation.

³⁵ Mark Harper MP HC Deb 24 Nov 2010, vol 519, col 349.

³⁶ HC Deb 1 Dec 2010, vol 519, col 865.

During the Bill's report stage in the House of Commons Jacob Rees-Mogg MP (Conservative) introduced a new clause which would have amended the Parliament Act 1911.³⁷ The clause extended section 2(1) of the 1911 Act to protect clause 1 of the Fixed-term Parliaments Bill.³⁸ This meant that the House of Lords would have been able to veto any amendment to the terms of the Bill.³⁹ Rees-Mogg explained the reasoning behind the amendment:

Either the Bill is serious and important, in which case it should be exempt from the Parliament Act 1911, or it is simply the contract for a marriage of convenience and so should fall at the next general election.⁴⁰

The constitutional logic of Rees-Mogg's argument was sound. It was similar to the argument advanced to support section 2(1) of the Parliament Act 1911, which itself was introduced as a result of scrutiny within Parliament.⁴¹ In 1911 the Government of the day accepted the case for the exemption on the basis that it would facilitate making five-year Parliaments 'necessary and inseparable from our constitutional system'.⁴² In this case the Government rejected Rees-Mogg's proposal on the basis that section 2(1) would protect the provisions in this Bill, without the need for special protection.⁴³ Whilst it is correct that section 2(1) of the 1911 Act means the Lords approval would be needed to enact any Bill which sought to amend this Bill and to extend the life of a Parliament beyond the five years, it

³⁷ HC Deb 18 Jan 2011, vol 521, col 707.

³⁸ HC Deb 18 Jan 2011, vol 521, col 708.

³⁹ Ibid.

⁴⁰ HC Deb 18 Jan 2011, vol 521, cols 712-713.

⁴¹ J Jaconelli, 'The Parliament Bill 1910-1911: The Mechanics of Constitutional Protection' (1991) 10 Parliamentary History 277.

⁴² Ibid.

⁴³ HC Deb 18 Jan 2011, vol 521, cols 730-31.

would not prevent a Government using the Parliament Acts to alter the Bill to suit its own needs in other ways. While they rejected the idea that resolutions could be used to secure fixed-terms, they were not prepared to include any statutory measures that would explicitly safeguard the terms of the Bill. Rees-Mogg's argument revealed the limits of the Government's desire to make the provisions of the Bill part of 'our constitutional arrangements'.

Bill Cash MP (Conservative) introduced a new clause during the report stage in the Commons. Cash proposed a sunset clause that sought to restrict the impact of the Bill to the current Parliament. Cash's justification for the sunset clause relied upon his interpretation of parliamentary sovereignty. He argued that the 'very concept of a fixed-term Parliaments Bill is offensive to the hallowed principle - that simple constitutional principle - that no Parliament can bind its successors'.⁴⁴ Or in other words he feared that the Bill might, despite the absence of any explicit measures designed to protect the Bill from amendment, become entrenched. His problem was with the substantive aim of the provisions in the Bill: 'the essence of the argument is that there is no rational basis on which legislation should be regarded as relating to any future Parliament'.⁴⁵ This last point appeared to be based upon a misunderstanding of the implications of constitutional legislation, as there are many examples of existing constitutional Acts which do relate to future Parliaments, the Parliament Acts being the best examples. The Parliament Acts, as this Bill proposed, set out in primary legislation a

⁴⁴ HC Deb 18 Jan 2011, vol 521, col 714.

⁴⁵ HC Deb 18 Jan 2011, vol 521, col 718.

normative system to which Parliament must adhere if it wishes to achieve certain ends. If Parliament wishes to depart from the terms of the 1911 Act, the Act must first be amended. The consequence of failing to adhere to the terms of the Act without first amending it was explored in *Jackson*.⁴⁶ The value of Cash's line of constitutional reasoning was that it highlighted that entrenchment, or at least the imposition of some form of normative limits on subsequent Parliaments, is not exclusively the result of 'entrenching' provisions. As Peterson argues, Parliament uses language in legislation as a 'commitment device'.⁴⁷ The point about these legislative devices is that they do not rely upon judicial enforcement 'in order to constrain future choices by the legislature'.⁴⁸ According to Cash's line of argument, limits can be achieved through the enactment of provisions that have the substantive aim of imposing normative limits on how future Parliaments should act.

In response to Cash's amendment, Chris Bryant MP (Labour) advanced an alternative interpretation of the effect of sovereignty upon Parliament's legislative capacity:

It is right to say that no Parliament is bound by its predecessor and no Parliament can bind its successor. However, there is one sense in which it can delay its successor, because it makes it have to re-legislate if it wants to take away a part of statute law.⁴⁹

⁴⁶ *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL).

⁴⁷ S Peterson, 'Constitutional Entrenchment in England and the UK' UK Const. L. Blog (25 March 2014) (available at <http://ukconstitutionallaw.org/>).

⁴⁸ Ibid.

⁴⁹ HC Deb 18 Jan 2011, vol 521, col 724.

Bryant's point shows that the Diceyan orthodoxy was limited in its ability to explain the constitutional impact of this Bill. Parliament may not be able to bind itself, but Parliament can legislate in such a way that has a political impact upon its future legislative capacity. As someone who might hope to form part of a future Labour Government, Bryant was concerned that such a Government 'would not want to have to introduce primary legislation to repeal this element of the Bill'.⁵⁰ Bryant's argument recognised the political reality that constitutional legislation can prove to be difficult to repeal or amend. The democratic logic of the Bill, the removal of the Prime Minister's discretion was likely to become *de facto* irreversible, and therefore it was important for Parliament to recognise that the content of this Bill should not be seen as merely temporary.

In response to these challenges in the Commons, the Minister in charge of the Bill, Mark Harper MP, explained that:

The Government hope, although they cannot bind their successors, that the public and future Parliaments will find the arrangements in the Bill acceptable and will keep them in place.⁵¹

It is difficult to know what to make of this justification. While every Government hopes that all its legislation will provide long-term solutions that stand the test of time, this does not mean that all legislation has the same impact on the legislative capacity of subsequent Parliaments. Constitutional legislation is not normally enacted to solve a short-term political problem, and in this sense it seems problematic for the Government

⁵⁰ Ibid.

⁵¹ HC Deb 18 Jan 2011, vol 521, col 732.

to innocently claim that they ‘hope’ that the legislation will last beyond the current Parliament, when it knows that constitutional legislation is likely to prove difficult to repeal or amend for future Governments and Parliaments, and that as long it remains in force it will have a major impact on the way that future Parliaments operate.

When the Bill began its passage through the Lords the Government maintained the same position on the Bill’s impact on future Parliaments. The Minister responsible for the Bill in the Lords, Lord Wallace of Tankerness (Liberal Democrat), said:

What we are seeking to do is have fixed-term Parliaments on into the future. Other Parliaments can repeal that, but obviously it would take primary legislation to repeal a system of fixed-term Parliaments... I very much hope that... fixed-term Parliaments would become the norm.⁵²

Just as in the Commons, the Government played down the potential impact of putting the provisions in this Bill onto the statute book. At the very least, fixed-term Parliaments would be the norm until a future Parliament could pass legislation that amended or repealed the provisions in this Bill. The picture created by the idea that Parliament would ‘be free to repeal’ fixed-terms is misleading. Again, this highlights the limitations of examining the constitutional implications of the Bill through the prism of the Diceyan orthodoxy. The constitutional reality is that such legislation could not be easily produced and passed. This argument also seemed in tension with the

⁵² HL Deb 21 March 2011, vol 726, col 508.

Government's argument that it was choosing to pursue the goal of fixed-terms through primary legislation, rather than through resolutions of the House, because it recognised that primary legislation was needed to make fixed-terms part of the constitution.

In the Lords, the analysis and scrutiny of the Bill's ambition to make fixed-terms part of the constitution was notably more focused and strategic than it was in the Commons. On the first day of report, Lord Pannick (Crossbench) moved an amendment, on behalf of himself, Baroness Boothroyd (Crossbench), Lord Butler of Brockwell (Crossbench) and Lord Armstrong of Ilminster (Crossbench), which had the aim of ensuring that future Parliaments would not be automatically bound by the terms of the Bill.⁵³

The amendment altered the clause so that each new Parliament would only be affected by the provisions in the Bill if both Houses passed a resolution approving that they should apply. If they did not then the terms of the Bill would not apply, although it remained unclear with what it would be replaced. Lord Pannick termed it a 'sunrise' clause. Lord Pannick explained that the amendment 'would ensure that the coalition Government will have their way as to the criteria governing this Parliament, but would leave future Parliaments to decide for themselves whether to apply the provisions in the Bill'.⁵⁴ Lord Pannick's argument for his amendment rested on the simple idea that the Government had failed to justify why the terms of the Bill

⁵³ HL Deb 10 May 2011, vol 737, col 822.

⁵⁴ Ibid.

should apply to Parliaments beyond that of 2010.⁵⁵ Lord Butler of Brockwell explained his concern:

The Government have a perfect right to commit themselves to a fixed-term for the present Parliament... What I do challenge is their right by making a permanent change to bind future Parliaments.⁵⁶

Baroness Boothroyd also argued that the Bill 'seeks to bind future Parliaments to the same legal restraints intended primarily for the lifetime of this coalition'.⁵⁷ The constitutional reasoning used to support the sunrise clause strikes at the heart of the constitutional implications of the Bill. While it would have a similar effect to the amendment proposed by Cash in the Commons, the Pannick amendment was supported by sound constitutional reasoning. Although in strictly legal terms the idea that the Bill would enact a 'permanent change' that would 'bind' was incorrect, the Crossbench group were right to challenge the idea that the possibility of repeal or amendment meant that the Bill would not amount to a constitutional restriction on future Parliaments.

In response, Lord Wallace of Tankerness reiterated that the Government 'hoped the provision would become part of our constitutional arrangements'.⁵⁸ He also questioned whether it would be politically possible for a Government to argue that they should revert to controlling the election date:

⁵⁵ HL Deb 10 May 2011, vol 727, cols 823-4.

⁵⁶ HL Deb 10 May 2011, vol 727, col 832-833.

⁵⁷ HL Deb 10 May 2011, vol 727, col 825.

⁵⁸ HL Deb 10 May 2011, vol 727, col 838

How would they react if a Minister came to the Dispatch Box of your Lordships' House and said that the Government wanted to return to the Prime Minister of the day being able to make a decision to suit his party interest rather than sticking to fixed-terms?⁵⁹

Lord Wallace also cast doubt on whether it would legally be possible to revert to the prior situation, as it was unlikely that the prerogative power could be resurrected, and therefore the Pannick amendment would need further amendments.

When Baroness Boothroyd and Lord Butler talk of Parliament being bound, they are referring not to what Diceyan orthodoxy would call entrenchment but to what Ryan, and others, refer to as 'political entrenchment',⁶⁰ the idea being that a constitutional Act can restrict Parliament in a way that ordinary legislation does not. Put more simply, a constitutional law can, in practice rather than in law, restrict the legislative capacity of Parliament. Despite the Government's failure to justify the constitutional implications of creating constitutional law, the value of the Pannick amendment and its justification was that it forced the Government to confront this point. The persuasiveness of the case advanced was confirmed when the House of Lords voted for the amendment and against the Government by 190 to 184.⁶¹ It was the first parliamentary defeat suffered by the Government on the Bill.

⁵⁹ HL Deb 10 May 2011, vol 727, col 841.

⁶⁰ Ryan (n 33).

⁶¹ HL Deb 10 May 2011, vol 727, col 845.

The House of Commons then considered the Pannick amendment. The Minister, Mark Harper MP, argued the amendment undermined the central purpose of the Bill, which was to make fixed-term Parliaments ‘an established part of our constitutional arrangements’.⁶² Harper also struggled to explain, in precise terms, the constitutional impact that the Bill would have. He again denied that the Bill aimed to bind future Parliaments, and emphasised that a future Parliament would be able to repeal this legislation.⁶³ This argument confirmed that the Government was not willing to defend the long-term implications of the Bill and its potential political entrenchment. Harper’s argument certainly did not persuade Bill Cash MP, who reiterated that in his view the Bill would entrench Fixed-term Parliaments, and he added: ‘This is fundamentally an attack on our sovereignty... it is unconstitutional’.⁶⁴ The Commons did not display the same enthusiasm for the amendment and it was reversed by a vote of 312 to 243.

On 18 July, the Lords considered the Commons rejection of the Pannick amendment. The Minister, Lord Wallace, put forward a detailed argument for rejecting the amendment that went beyond the reasoning that the Government had previously offered. The democratic mandate of the House of Commons was central to his constitutional reasoning. He noted that while the Lords had passed the amendment by a majority of six, the Commons had

⁶² HC Deb 13 July 2011, vol 729, col 360.

⁶³ HC Deb 13 July 2011, vol 729, col 367.

⁶⁴ HC Deb 13 July 2011, vol 729, col 379.

voted against them by a majority of 69.⁶⁵ His other main line of attack was to criticise the workability of the amendment.⁶⁶ In particular he pointed to the uncertainty that would result from a motion that failed to sunrise the Act. Would the prerogative power of the Monarch be reinstated? Further, the very idea of an Act's validity being dependent on the motions of both Houses, and in particular the unelected Lords, was a novel procedure, and one that would appear to challenge the balance of power between the two Houses.⁶⁷

Lord Wallace then turned to the Government's position on the status of constitutional legislation. He referred to the passage of the European Union Bill, another important constitutional Bill from the 2010-12 session, where the Government rejected a sunset provision on the basis that primary legislation should not be able to be repealed by a resolution. To support the idea that primary legislation should only be repealed by primary legislation he quoted the words of the European Scrutiny Committee:

All Parliaments legislate for the future. Laws passed by one Parliament do not contain a sunset clause at the Dissolution. The real point is whether a government can, in law, make it difficult for a future Parliament to amend or repeal the legislation it has passed; in our view it cannot. Our conclusion therefore is straightforward, an Act of Parliament applies until it is repealed.⁶⁸

⁶⁵ HL Deb 18 July 2011, vol 729, col 1076.

⁶⁶ HL Deb 18 July 2011, vol 729, cols 1076-77.

⁶⁷ HL Deb 18 July 2011, vol 729, col 1077.

⁶⁸ European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (HC 2010-12 633-I) para 90.

The implication of the Government's argument was that there was no need to make it easier to repeal constitutional legislation by inserting sunset or sunrise clauses, because constitutional legislation is no harder to repeal than ordinary legislation. Or in other words it is simply not possible to make some legislation harder to repeal than other legislation. The European Scrutiny Committee is right that parliamentary sovereignty means that attempts to entrench legislation by inserting provisions that are expressly designed to make the legislation harder to amend might be ineffective. If a Parliament passed an Act with such provision, a subsequent Parliament could repeal it using the ordinary procedure, and it is extremely unlikely that the courts would be able to enforce the entrenching provision after it was repealed. If they did it would represent a radical departure from the existing constitutional position.⁶⁹ In the context of the referendum requirements within the European Union Act 2011, it is understandable why the Committee sought to make this point.⁷⁰ Responsibility for the effectiveness of the referendum 'locks' in the 2011 Act depends upon Parliament and the Government. Nevertheless, the Committee's reasoning could be seen as an oversimplification of entrenchment. Part of the Bill's intent, although not stated expressly, was to limit Parliament and the Government's ability to decide the date of a general election. The Government did not want the courts to enforce the provisions in the Bill, and so in one sense, the Bill implicitly demands that Parliament itself gives

⁶⁹ See J Goldsworthy, *Parliamentary Sovereignty Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) Chapters 9 and 10.

⁷⁰ See P Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) 48 *Common Market Law Review* 1955; J Murkens, 'The European Union Act 2011: A Failed Statute' (2012) 3 *Tijdschrift voor Constitutioneel Recht* 396.

effect to the Bill. Any entrenching effect that the Bill might have is therefore primarily political, which means that the Diceyan logic of the European Scrutiny Committee does not capture the potential politically entrenching effect that the Bill might have.

The House was not persuaded by Lord Wallace's plea and it insisted on the Pannick amendment; the Government was again defeated by 259 to 219, a majority of 40, a notable increase on the vote at report stage.⁷¹ The Pannick amendment returned to the Commons on 8 September. Mark Harper MP continued his mirroring of the arguments of Lord Wallace. The real significance was that he offered a concession to the Lords, in the form of an amendment in lieu that would create an obligation to set up a commission in 2020 to investigate how the scheme was working.⁷² The Commons voted to accept the Government's concession in lieu of the Pannick scheme by 253 to 190.⁷³

The amendment in lieu was then considered by the Lords. The Government restated its case, again emphasising that the Lords should now give way to the will of the 'elected Chamber'.⁷⁴ Lord Pannick made the case for his amendment for a final time. He reminded the House of the constitutional position of negotiations. At this stage, as the Lords and the Commons had disagreed twice, 'the Government are obliged to accept our amendments,

⁷¹ HL Deb 18 July 2011, vol 729, col 1103.

⁷² HC Deb 8 September 2011, vol 532, col 581.

⁷³ HC Deb 8 September 2011, vol 532, col 596.

⁷⁴ HL Deb 14 September 2011, vol 730, col 809.

lose the Bill, or produce...alternative proposals'.⁷⁵ He described the amendment in lieu as equivalent to 'burying it [the Lords' concerns] in a time capsule' and as 'derisory'.⁷⁶ Lord Elystan-Morgan made the important point that in his view the House of Commons does not have primacy on the issue of the length of parliamentary terms, and cited the 1911 Act as evidence.⁷⁷ The House then voted on the Pannick amendment; it was defeated by 188 to 173, a majority of 15.

The sustained scrutiny of the impact of this Bill upon the constitution beyond 2015, in spite of parliamentary sovereignty, did not produce a significant amendment to the substance of the Bill. The statutory review in 2020 could be a catalyst for change, and would therefore prove to be a more significant concession than at first sight. The significance of the constitutional interpretation within Parliament on this point extends beyond the impact on the Bill. The Government introduced this significant constitutional change to Parliament with no pre-legislative scrutiny, and little in the way of reasoned justification for the potential long-term impact of the Bill. As a result, the quality of the deliberation that preceded this change depended on the nature of the questions asked and amendments moved by parliamentarians. The parliamentarians responsible for the scrutiny described above would have known that the chances of securing a major concession on this particular aspect of the Bill were unlikely, but the strength of their arguments did expose the weaknesses of the Government's

⁷⁵ HL Deb 14 September 2011, vol 730, cols 810-11

⁷⁶ Ibid.

⁷⁷ HL Deb 14 September 2011, vol 730, cols 814-815.

reasoning. This prompted the Government to develop its justification for the impact of the Bill on the constitution, and for such a significant change this was a key contribution to the quality of the process. It served to publicise the reasoning behind the Bill, and to expose further its potential effect upon the constitution. The reasoning on entrenchment was particularly important because of the self-enforcing nature of the provisions. The Bill envisaged that it would be Parliament that would give effect to the Bill, and therefore the debate served to explain what the provisions entailed for Parliament. As we saw in the analysis of the Health and Social Care Bill, this can be crucial to the effectiveness of the provisions that rely exclusively on political enforcement.

5.2.2 Asquith's intention

The Bill's provision for five-year rather than four-year fixed-terms provoked more debate in Parliament than any other issue within the Bill. For many parliamentarians, particularly Labour MPs, the problem with clause 1 of the Bill was that in opting for the longer of the two possible lengths, and thereby making general elections less frequent, the Government was making Parliament less accountable primarily to suit the needs of the Coalition to last a full five years. This sub-section focuses on one particular strand of this debate. The Government repeatedly justified the decision to opt for five years on the basis that it was in keeping with existing constitutional norms, in particular the Septennial Act 1715 as amended by the Parliament Act 1911. A number of parliamentarians challenged this interpretation, and the debate on this particular justification provides insight

into the role of parliamentary constitutional interpretation within the process of constitutional change.

The first time the Government attempted to justify the five-year term in these terms was in the oral evidence given by the Deputy Prime Minister, Nick Clegg MP (Liberal Democrat), to the Political and Constitutional Reform Committee (PCRC). Clegg argued before the Committee that the provision for five-year fixed-terms ‘goes with the grain’ of the foundation texts of the constitution, namely the Septennial Act 1715.⁷⁸ In response, the Committee challenged the notion that the idea that a five-year maximum can be used to justify the creation of five-year fixed terms.⁷⁹ To support the point the Committee quoted the words of Herbert Asquith, who during the second reading of the 1911 Act said that the five-year limit would probably amount to a ‘working term of four years’.⁸⁰ The Committee suggested that the notion that the Bill is ‘going with the grain’ underplays what is ‘significant change’.⁸¹ They pointed out that by moving to five-year fixed terms the Bill gives the full five-year term a new integrity that it did not have under the existing arrangements.⁸² The Committee’s analysis revealed the problems with Clegg’s claim, which reinforced the impression that the Government had not sufficiently developed its case for the Bill.

⁷⁸ Political and Constitutional Reform Committee, *The Fixed-term Parliaments Bill* (HC 2010-12 436) para 10.

⁷⁹ Political and Constitutional Reform Committee (n 78) para 11.

⁸⁰ *Ibid.*

⁸¹ Political and Constitutional Reform Committee (n 78) paras 10-12.

⁸² Political and Constitutional Reform Committee (n 78) para 12.

At second reading in the Commons, despite the report of the PCRC, Clegg continued to argue that five-year fixed terms were in 'keeping with our current arrangements'.⁸³ Clegg used Asquith's words, the same words quoted by the PCRC to show that he was wrong, to again justify the decision to opt for five-year fixed terms. His argument was that Asquith's use of the words 'a working four-year term' referred to the fact that the last year of Parliament is often lost to preparations for the election, rather than suggesting that a general election would be called after four years. For Clegg this meant that the same logic could be applied to a five-year fixed term.⁸⁴ Five-year fixed terms are justified because, like a five-year maximum, they too will result in a working term of four years. The most obvious difficulty with this argument is that it appeared to misrepresent the point Asquith was making. In response, Jack Straw MP (Labour) said that Clegg 'cannot use that quotation to justify something that was never the sense that Asquith was putting across'.⁸⁵ Straw's critique again highlighted the weakness of the Government's justification for this key element of the Bill.

This disagreement over Parliament's intention in 1911 reveals an important element of parliamentary constitutional interpretation. As we have already seen in the previous case studies, well reasoned constitutional interpretation can prompt the Government to develop its own justification for the constitutional norms it is attempting to enact. Although Clegg's justification

⁸³ HC Deb 13 September 2010, vol 515, col 625.

⁸⁴ *ibid.*

⁸⁵ HC Deb 13 September 2010, vol 515, col 626.

was weak, he was limited by the complexity of the normative system that the Bill sought to change and the absence of further clear statements by the Government on the change to the Septennial Act 1715 in 1911. In the absence of judicial constitutional interpretation the legislature is the primary interpreter of the constitutional norms in the 1911 Act, and this reliance meant that in the absence of parliamentary scrutiny of the provision, there was little to guide the Parliament of 2010's understanding of the five-year statutory maximum. Had there been further scrutiny of the provision in 1911 there might be constitutional interpretation to inform the debate on the proposal to repeal the Septennial Act 1715.

Perhaps more importantly, the whole framework of existing constitutional norms, which were crucial to analysing the significance of the change, was difficult to interpret. The style of drafting used, and the absence of much in the way of *travaux préparatoire*, made it difficult for parliamentarians to assess both the Government and Parliament's intention in 1911. There was little to help to explain the reasoning behind the relationship between the statutory maximum and the Prime Minister's ability to call an election. This might be because the normative framework was not the result of a well-designed plan, but instead the product of a pragmatic compromise. Nevertheless, it is worth noting how this constitutional pragmatism impacts upon the process of constitutional change within Parliament.

Throughout the parliamentary debate supporters of the Bill continued to justify the decision to opt for five-year fixed terms on the basis that the Bill

conformed with the very constitutional norms it was repealing and replacing. Eleanor Laing MP (Conservative) said, ‘there is no expectation that a Parliament should run other than for five years... there is a law and it says five years’.⁸⁶ Central to this argument was the idea that the Government did not need to enact legislation to stay in office until 2015, a point made by Louise Bagshawe MP (Conservative).⁸⁷ Mark Harper MP, speaking for the Government, added to this line of argument; he said, ‘the Bill has nothing to do with extending the term of this Parliament’.⁸⁸ This line of reasoning revealed that the Government was unwilling to admit fully the full constitutional implications of the Bill. The existence of a statutory maximum did not justify that maximum length being chosen as the basis for fixed-terms, a point emphasised by Tristram Hunt MP (Labour), a member of the PCRC:

Coalition members do not understand the difference between the norm and the maximum.⁸⁹

The failure to make this distinction was a key weakness in the Government’s justification for the Bill. If anything the existing norms could only be used to justify a four-year fixed-term, a point made by Professor Blackburn, who in evidence to the PCRC said:

The proposal for fixed-term parliament as a whole should fit as closely as possible into existing constitutional expectations, and the idea that four years is about the right time between elections is very prevalent. It was the period expressly approved of as being in

⁸⁶ HC Deb 16 Nov 2010, vol 518, col 796.

⁸⁷ HC Deb 16 Nov 2010, vol 518, col 807.

⁸⁸ HC Deb 16 Nov 2010, vol 518, col 838.

⁸⁹ HC Deb 18 January 2011, vol 521, col 802.

practice, when the Parliament Act set the period of five years as a maximum.⁹⁰

It was almost as if the Government was reluctant to admit the extent to which the system in the Bill was a departure from the status quo. Without acknowledging the extent to which the Bill represented a departure from existing norms it was difficult to build a more convincing case for the Bill. This weakness was exposed by the scrutiny in the Commons that used the analysis of the existing constitutional arrangements.

At third reading the Deputy Prime Minister returned to the issue of five-year terms. It appeared that since second reading the Government had moved on from the idea of continuity:

We (the Liberal Democrats) were in favour of fixed-term Parliaments above and beyond all else, and always accepted that the issue of whether it was four or five years was a matter of judgment... Personally I would not fetishize about 12 months one way or another in a term of four or five years.⁹¹

He seemed to imply that the Government's position to opt for five years was not based on a desire to preserve continuity but rather simply a 'judgment'.

In the Lords the constitutional reasoning behind the decision to opt for five years continued to come under fire. In line with the PCRC, the House of Lords Constitution Committee made the important point that there is a

⁹⁰ Political and Constitutional Reform Committee (n 78) ev 45-48.

⁹¹ HC Deb 18 January 2011, vol 521, cols 793-794.

major ‘difference between a five-year maximum and a five-year norm’.⁹² At second reading the Minister in charge of the Bill, Lord Wallace of Tankerness, repeated the line used by the Deputy Prime Minister at third reading in the Commons: ‘It is not an exact science; it is a question of judgment’.⁹³ However, this did not prevent him from trying to mount a principled defence of five years. He again pointed out that five-year terms are in line with existing constitutional norms and argued that they represent a degree of continuity with recent practice.⁹⁴ Again it was key to the Government’s argument that the Bill would not extend the period between elections.⁹⁵ To support this he claimed that an advantage of five-year fixed-terms would be that the final year would not be lost to electioneering: ‘under this Bill, it will be possible for a Government to plan properly for a full five-year term’.⁹⁶ This would appear to contradict what Clegg had argued at second reading in the Commons. Then during the committee stage of the Bill, Lord Wallace appeared to change course and to support the Deputy Prime Minister’s interpretation of Asquith:

Clearly he did not say that the term would be for four years but that the practical legislative working term would be four years was referring to the fact that a five-year term would be in effect a four-year term because the final year would be lost to electioneering.⁹⁷

⁹² House of Lords Select Committee on the Constitution, *The Fixed-term Parliaments Bill* (HL 2010-12 69) para 60.

⁹³ HL Deb 1 March 2011, vol 725, col 932.

⁹⁴ Ibid.

⁹⁵ HL Deb 1 March 2011, vol 725, col 933

⁹⁶ Ibid.

⁹⁷ HL Deb 21 March 2011, vol 726, col 505.

His argument was that Asquith's reasoning supports a five-year fixed-term because a four-year fixed-term would result in a working term of three years that would be too short.⁹⁸

The scrutiny of this aspect of the Bill also demonstrated how the form and clarity of the constitutional norms subject to interpretation, and the debate that underpins their enactment, may influence the nature of constitutional interpretation within Parliament. As with debate on entrenchment, the Government may never have been at risk of defeat over the length of the fixed-term, but again the weakness of the Government's position needed to be exposed and unpicked. Parliamentarians' ability to use constitutional interpretation played a central part in that process. Constitutional legislation such as the 1911 Act, which is not expected to be enforced by the courts, should perhaps do more to ensure that it can be clearly understood and interpreted by those that are responsible for its effectiveness, namely parliamentarians. This means that the provisions themselves should be designed so that they are accessible, but also that the documents and the parliamentary debates that underpin their enactment maximise their potential to identify the reasoning that lies behind the legislation.

5.2.3 Speaker's certificates

Clause 2 of the Bill contained two complimentary mechanisms to allow the House of Commons to bring out about an early general election.⁹⁹ Both of these mechanisms relied upon a system of 'Speaker's certificates'. This sub-

⁹⁸ HL Deb 21 March 2011, vol 726, col 506.

⁹⁹ The Fixed-term Parliaments Bill HC Bill (2010-12) [64] cl 2 (1) and (2).

section critically analyses parliamentarians' use of constitutional interpretation in the debate on this element of clause 2. A number of constitutional norms featured prominently in the debate namely: parliamentary privilege; the neutrality of the Speaker of the House of Commons; and the convention of the confidence procedure.

The Clerk of the House of Commons, Sir Malcolm Jack, was the first to highlight the constitutional implications of the system of Speaker's certificates. In written evidence to the PCRC, Jack claimed that the certificates within clause 2 of the Bill risked allowing the courts to adjudicate on the internal workings of Parliament.¹⁰⁰ His view of the Bill was based upon his interpretation of the House of Lords case of *Jackson*.¹⁰¹ Jack said that the case 'indicates the extent to which matters affecting the internal jurisdiction of the Houses may become adjudicated in the courts once they are embedded in statute'.¹⁰² He argued that by placing the internal proceedings of the House of Commons into statute, the Bill left open the possibility that the courts could be called upon to interpret their meaning. This meant that the provisions in the Bill could affect both the 'established privileges of the House of Commons' and 'the essential comity which has been established over a long period between Parliament and the courts'.¹⁰³ The PCRC did not endorse his view.¹⁰⁴ Its report on the Bill noted that other experts did not share Jack's concerns over the justiciability of the

¹⁰⁰ Political and Constitutional Reform Committee (n 78) ev 19-22.

¹⁰¹ *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL).

¹⁰² Political and Constitutional Reform Committee (n 78) ev 19-22.

¹⁰³ *Ibid.*

¹⁰⁴ Political and Constitutional Reform Committee (n 78) paras 25-34.

provisions. Nevertheless, Jack's concerns made a significant impact on Parliament's scrutiny of the Bill. It is important not to lose sight of the significance of the Clerk's intervention. The Clerk of the House of Commons is a significant authority on matters of privilege and parliamentary procedure, and it is rare for a Clerk to give evidence on a Government Bill in this way. It is surprising that the Committee did not give more weight to his views, especially as only three other experts were consulted.

During second reading in the Commons Clegg made reference to the Clerk's views and said:

We are satisfied that the courts will continue to regard matters certified by the Speaker as relating to proceedings in Parliament and therefore falling under the protection of article 9 of the Bill of Rights.¹⁰⁵

He added that he disagreed with the Clerk's interpretation of the *Jackson* case, claiming that the case is authority that the courts will consider the validity of an Act, and not the internal proceedings of Parliament.¹⁰⁶ This is right in the sense that Lord Bingham said in *Jackson* that the case did not require the Court to 'investigate the workings and procedures of Parliament'.¹⁰⁷ However, one wonders if that deals with the entirety of the Clerk's argument, because Lord Bingham also said in *Jackson* that the question of validity of the Act had to be addressed because it was 'a

¹⁰⁵ HC Deb 13 September, vol 515, col 631.

¹⁰⁶ Ibid.

¹⁰⁷ *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL) 20.

question of law which cannot, as such, be resolved by Parliament'.¹⁰⁸ It is not inconceivable, should such a dispute arise over whether the procedures in the Bill had been followed correctly, that the same point could not be made by a court about this Bill's provisions. It is not unheard of for a court to depart from existing precedent, and it could be reasonably argued, as the Clerk of the Commons did, that such an occurrence is made more likely by Parliament passing legislation that is unprecedented.¹⁰⁹ The Government gave a more detailed response to the view of the Clerk in its response to the PCRC's report on the Bill.¹¹⁰ The response, written by Mark Harper MP (Conservative), confirmed the interpretation of *Jackson* given by Clegg above, and rejected the idea that the Courts might ignore the ouster clause. In relation to the ouster clause, Harper claimed that unlike in *Anisminic*, the courts have no existing jurisdiction to consider parliamentary proceedings and therefore would not try to get around the clause. Harper also argued that he saw no reason why the Bill would lead the Courts to depart from established precedents on the justiciability of internal parliamentary proceedings.

During the committee stage in the Commons, the PCRC put forward an amendment to the system of Speaker's certificates.¹¹¹ The amendment removed the Speaker's certificate system and replaced it with a provision

¹⁰⁸ Ibid.

¹⁰⁹ For a discussion of the judicial enforcement from a comparative perspective, see R Young and N Thomas-Symonds, 'The Problem of the 'Lame Duck' Government: a Critique of the Fixed-term Parliaments Act' (2013) 66 Parliamentary Affairs 540.

¹¹⁰ The Cabinet Office, *Government response to the Political and Constitutional Reform Committee's Report* (Cm 7997 2010).

¹¹¹ HC Deb 24 November 2010, vol 519, col 299.

that would require agreement between the leaders of the main parties. The mover of the amendment, Eleanor Laing MP, a member of the PCRC, said that she did not support the amendment.¹¹² The proposed alternative system was criticised by a number of MPs for being poorly constructed.¹¹³ This highlighted the importance of drafting to the success of amendments. Even if an amendment is unlikely to convince the Government to change the Bill, in order to generate support within the chamber amendments need to be well drafted.

Tristram Hunt MP was not satisfied by the Government's response to the Clerk's concerns over justiciability:

... because the certificate would be laid out in statute law, any disputes about whether the Speaker had been right to issue the certificate would have to be settled in the courts.¹¹⁴

He argued that the courts could ignore the ouster clause in clause 2(4), as they did in *Anisminic*.¹¹⁵ Hunt also quoted from *Chaytor* to highlight the changing nature of privilege.¹¹⁶ Bernard Jenkin MP (Conservative) moved an amendment that would bolster the ouster clause preventing the Courts from questioning the Speaker's certificate.¹¹⁷ Like Hunt, Jenkin was mystified by the way that the Government treated the opinion of the Clerk. He supported the Clerk's analysis and thought that the entire Bill should be achieved through standing orders. In response, Harper explained that the

¹¹² HC Deb 24 November 2010, vol 519, col 300.

¹¹³ HC Deb 24 November 2010, vol 519, cols 300-349.

¹¹⁴ HC Deb 1 December 2010, vol 519, cols 854-856.

¹¹⁵ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

¹¹⁶ *R v Chaytor and others* [2010] UKSC 52.

¹¹⁷ HC Deb 1 December 2010, vol 519, col 843.

Chaytor case was not relevant, because it related to expenses, over which the House has never asserted control, and that the Bill's aims could not be achieved through standing orders.¹¹⁸ He also repeated that he agreed with the three other experts consulted by the PCRC, who said it was extremely unlikely that the courts would be able to enforce the provisions in the Bill.¹¹⁹

Another issue with the system of Speaker's certificates was that they could potentially risk the impartiality of the Speaker of the House of Commons. Part of the problem with the proposed system of certification was that the existing conventional procedure did not provide a precise definition of what qualified as a vote of no confidence. The system in clause 2 would require the Speaker to decide whether a vote was a vote of no confidence based upon the existing convention. It would seem that the Government decided against defining the form of a vote of no confidence in order to preserve some continuity with the conventional system. But by making the Speaker decide which motions would be worthy of certificate, it would put the Speaker in a difficult political position. Chris Bryant MP argued that the Bill should define the form of words needed to qualify as a motion of no confidence and he tabled an amendment to that effect.¹²⁰ It was opposed by the Government and defeated.¹²¹ He also argued that the timing of the issuing of the certificate would be problematic. Harper dismissed these claims, explaining that they would expect the Speaker to take a literal

¹¹⁸ HC Deb 1 December 2010, vol 519, col 866.

¹¹⁹ *Ibid.*

¹²⁰ HC Deb 24 November 2010, vol 519, col 360.

¹²¹ HC Deb 1 December 2010, vol 519, col 876.

approach, and added that it was no different to the procedure for the certification of a money Bill under the Parliament Act 1911.¹²² In response Bryant pointed out that the Lords do contest what qualifies as a Money Bill under that Bill, and that the decision when to hold a general election could be extremely contentious.¹²³

In their report on the Bill, the Constitution Committee questioned the merits of the system of Speaker's certification for the new confidence procedure.¹²⁴ The Committee's primary concern was that the lack of clarity over what constitutes a vote of no confidence would put the Speaker in a difficult position in issuing the certificate. They recommended that the Government amend the definition to clarify its scope. The Committee also stated that it did not share the Clerk's concerns over justiciability, and therefore their concern was based solely on the effect it would have on the neutrality of the Speaker.

In the Lords the Government, in stark contrast to its attitude in the Commons, indicated from the outset that it was willing to make changes to the mechanics of the Bill. During the committee stage, Lord Howarth of Newport (Labour) moved an amendment to the Speaker's certificate system, which would mean that the certification would occur before the motion was debated.¹²⁵ In his speech to support his amendment, he pointed out that the problem with Harper's comparison with the certification of Money Bills in

¹²² HC Deb 1 December 2010, vol 519, col 829.

¹²³ Ibid.

¹²⁴ House of Lords Constitution Committee (n 92) paras 88-158.

¹²⁵ HL Deb 21 March 2011, vol 726, cols 584-588.

the 1911 Act was that the characteristics of Money Bill are described within that Act. He then outlined three key constitutional problems with the Speaker's certificate system as it applies to the no confidence clause. Firstly, a motion of no confidence is difficult to define. Secondly, the procedure could bring the Speaker into political controversy. Thirdly, the system is open to legal challenge. In response Lord Wallace, the Minister, indicated that they would return to the matter, but that the Government's view was these concerns were unfounded, and that there was nothing exceptional about what the system was asking of the Speaker.¹²⁶

Lord Howarth moved a second probing amendment to remove the system of Speaker's certificates from the Bill.¹²⁷ This amendment prompted significant contributions from two former Speakers of the House of Commons. Baroness Boothroyd (Crossbench), Speaker from 1992 to 2000, made a number of criticisms of the system of speaker certificates in the Bill.¹²⁸ She argued that the system would risk putting the Speaker in a very difficult political situation, namely because the interpretation of what qualifies as vote of no confidence is so difficult. This statutory role, she argued, would extend the Speaker's role in a way that would fundamentally affect the office. In her view it would 'jeopardise his independence and impair his responsibilities to defend the rights and reputation of Parliament'.¹²⁹ She also endorsed the views of the Clerk, and argued that the Bill would allow the courts to adjudicate on Commons procedure. Lord

¹²⁶ HL Deb 21 March 2011, vol 726, col 588.

¹²⁷ HL Deb 29 March 2011, vol 726, cols 1086-89.

¹²⁸ HL Deb 29 March 2011, vol 726, col 1136-1137.

¹²⁹ Ibid.

Martin of Springburn (Crossbench), Speaker from 2000 to 2009, also attached great weight to the advice of the Clerk, and said that it should be treated with respect as it represents ‘the collective point of view of the constitutional experts we have in the House of Commons.’¹³⁰ He also concurred with Baroness Boothroyd that the clause 2(1) procedure would put the Speaker under a great deal of undesirable political pressure. Many other peers concurred with the words of the former Speakers, and Lord Falconer (Labour) even suggested that the Lords might refuse to give the Bill a third reading, which was an indication of the seriousness of the Lords’ constitutional concerns over this aspect of the Bill.¹³¹

The Government’s response to this debate demonstrated the impact of the former Speakers’ use of constitutional interpretation. Lord Wallace said that the Government would be willing to amend the system of Speakers’ certificates in order to prevent the Speaker being drawn into political controversy.¹³² This marked a change in the Government position, which up to this point maintained that the Speaker’s certificates would not risk the Speaker’s neutrality. However, on the potential intervention of the courts Lord Wallace mounted an in-depth defence of the Government’s position, which went much further in terms of constitutional justification than any explanation given thus far. He explained that the role of the certificate was to emphasise that the subject matter of clause 2 was a matter exclusively for Parliament. Further, he added the certificate was designed to make sure that

¹³⁰ HL Deb 29 March 2011, vol 726, col 1139.

¹³¹ HL Deb 29 March 2011, vol 726, col 1146.

¹³² HL Deb 29 March 2011, vol 726, col 1147-1150.

it was not the Government which determined whether there has been a vote of no confidence. He said it was designed to make it ‘legally certain’ that the terms of the Bill have been met.¹³³ This did acknowledge that the questions were in fact linked, because the likelihood of a legal dispute was related to the certainty of the procedure within the Bill.

During the committee stage, Lord Cormack (Conservative) made another attempt to alter the no confidence procedure in clause 2, with an amendment that sought to define a motion of no confidence.¹³⁴ His amendment contained four different forms of no confidence motions. Lord Howarth of Newport then introduced an amendment to Lord Cormack’s definition, which would remove two of the forms of motion suggested.¹³⁵ Lord Howarth argued that the whole system of Speaker’s certificates was flawed and that it was impossible to define the existing no confidence procedure in legalistic terms. Lord Wallace, the Minister, again gave a constructive response to the debate, and he explained that the Government had decided against definition for precisely the reason that Lord Howarth had criticised Lord Cormack’s amendment.¹³⁶ Lord Wallace agreed to meet with all the Peers interested in clause 2, with the aiming of drawing up a more acceptable solution.

During the report stage, Lord Howarth moved an amendment that introduced a new version of clause 2, and removed the process of Speaker

¹³³ HL Deb 29 March 2011, vol 726, col 1150.

¹³⁴ HL Deb 29 March 2011, vol 726, col 1181.

¹³⁵ HL Deb 29 March 2011, vol 726, col 1188.

¹³⁶ HL Deb 29 March 2011, vol 726, col 1215

certification from both forms of early dissolution.¹³⁷ The new clause set out the specific words that must be used for both a motion of confidence and for a motion of no confidence. The new clause was the product of a meeting between the Minister and interested parties since the end of the committee stage. The Minister added his name to the new clause. The clause marks a clear change to nature of the confidence procedure. Lord Howarth explained:

Motions understood politically to relate to confidence could in future still be debated and voted on in a multiplicity of forms, just as they have in the past. But for the purposes of establishing constitutionally and legally, in the new context of this fixed-term parliaments legislation and provision within it for an early parliamentary election, whether a Motion of confidence or no confidence has or has not been passed, the Motion must be tabled in the precise terms prescribed in the new clause.¹³⁸

He also said that the simpler system made the chances of court intervention less likely. The Commons accepted the changes, although Chris Bryant MP pointed out that the Government had opposed very similar amendments in the Commons.¹³⁹

The development of the debate in the Lords showed how constitutional interpretation facilitates the analysis of clauses with constitutional effect. At first sight, the Speaker's certificates system maintained continuity with the

¹³⁷ HL Deb 16 May 2011, vol 727, cols 1146-1147.

¹³⁸ HL Deb 16 May 2011, vol 727, col 1149.

¹³⁹ HC Deb 13 July 2011, vol 531, col 388.

existing conventions of the confidence procedure by not defining the form that a motion of confidence must take. However, by applying the principle of the political neutrality of the Speaker and parliamentary privilege to the relevant clauses, parliamentarians were able to show that the clauses, and the Government's reasoning in support of them, were problematic. The solution crafted made the procedure clearer and more certain, which may reduce the risk of the courts' intervention, and therefore mitigate Jack's concerns with the original system.¹⁴⁰ Peers in the Lords were able to use their understanding of constitutional norms to design a solution that improved the clarity of the procedure and maintained aspects of the original convention. On a different note, it was noticeable that most parliamentarians did not think that judicial enforcement could provide a solution to the difficulty of designing a system of breaking the fixed-term that was not easily abused.¹⁴¹ As Youngs and Thomas-Symonds point out, having an independent body decide on whether the provisions have been used correctly seems like a logical way of preventing abuse.¹⁴²

Conclusion

Constitutional interpretation played a key role in each of the debates examined above. This is to be expected. Not only was it a Bill of first class constitutional importance, it was also a Bill directed at Parliament and parliamentarians. The substance of the Bill sought to regulate Parliament. The scrutiny of the Bill therefore provided parliamentarians with an

¹⁴⁰ Young and Thomas-Symonds (n 110) 554.

¹⁴¹ Young and Thomas-Symonds (n 110) 546.

¹⁴² Young and Thomas-Symonds (n 110) 554-555.

opportunity to make use of their own experiences, their understanding of the parliamentary process, and most importantly for these purposes, some of the most significant norms of the constitution. The basic point is that in contrast to the two previous case studies, analysis and scrutiny of the entire substantive content of this Bill depended upon constitutional interpretation. This reliance on constitutional interpretation highlighted a number of factors that affect how the practice contributes to the legislative process and the constitution.

Of the three case studies, the debate on this Bill demonstrated, more than any other, the limitations of parliamentary constitutional interpretation. More parliamentarians in both Houses engaged in constitutional interpretation than in each of the two previous case studies; however, this Bill showed the Government at its least constructive, and this demonstrated the extent of the Government's control on the nature of the debate. The first major problem was the absence of any formal pre-legislative scrutiny. Although the Bill was short, the implications for the constitution were profound and complex, and the timetable did not allow either the Government or Parliament the time to generate the background analysis that was needed to inform the scrutiny of the Bill in the House of Commons. The first consequence of this was that when the Government introduced the Bill in the House of Commons, the arguments in favour of the key clauses in the Bill were notably under-developed. They neither engaged with any of the existing debate in favour of fixed-terms, nor anticipated the most obvious objections. But most significantly, their arguments did not address

the detail of the Bill itself or how it would fit within the constitution. Some of the reasons advanced misrepresented the reality of the change that they were seeking to enact. While in the two previous case studies it was possible to understand why the Government did not have well-developed arguments to support the constitutional effect of the relevant clauses at the outset, in the sense that they were secondary to the substance of the policy pursued, in this case constitutional interpretation was central to the substance of the Bill. Therefore the absence of a well-justified case for some of the key provisions in the Bill meant that much of the constitutional interpretation was simply concerned with getting the Government to face up to the implications of its own Bill, rather than actually engaging with the Government's justification.

The Government's failure made the task of constitutional interpretation more difficult for parliamentarians engaged in scrutiny of the Bill, and at the same time it made their use of the practice all the more important to the quality of the process. Parliamentarians and committees from both Houses did rise to the occasion and forced the Government to confront the implications of the detail of the Bill. The passage of this Bill demonstrates some of the key differences between the approaches in the House of Commons and the House of Lords to the scrutiny of the constitutional effect of a Bill. The intervention of the PCRC was particularly important. Departmental Select Committees do not regularly produce reports on Government Bills, and in a short time frame the committee was able to produce a report which made a number of significant criticisms of the Bill,

analysed the normative framework, and contained influential evidence from the Clerk of the House of Commons and leading academics. During the debate in the Commons, a number of parliamentarians constructed amendments and arguments that used constitutional interpretation. However, despite the significance of the Bill, the scrutiny was markedly less effective than in the Lords. The problems with the Commons' approach was typified by Eleanor Laing MP, who moved a probing amendment that she did not herself support, and that was ineffective because critics of the Bill found the amendment to be unworkable. Even when MPs produced well-argued critical analysis of the Bill, the absence of any prospect of defeat meant that the Government did not provide much in the way of a reasoned response.

Constitutional interpretation also helped the Government to ensure that the drafting of the Bill matched its stated aims. For example, in relation to the confidence procedure, the Government stated that it did not intend to change the substance of the convention. However, when confronted with the reality of what it proposed and how that departed from existing arrangements, it accepted the need to devise an alternative set of clauses. The ability of parliamentarians to translate their concern into workable alternative clauses made a major difference to the impact of their constitutional interpretation. This resulted in a clause that protected a value of the existing constitution: the neutrality of the Speaker of the House of Commons. Even the unsuccessful attempt to insert a sunrise clause in the Lords showed that the ability of peers to capture the essence of their arguments in the form of an

amendment is central to the ability of parliamentary constitutional interpretation to add to the debate. Peers were able to translate their concern over the impact of the constitutional provisions over subsequent Parliaments into an amendment that provoked a Government defeat, and prompted the Government to develop significantly its case for the Bill.

The parliamentary constitutional interpretation in this Bill also showed how the qualities of the relevant constitutional norm contribute to its ability to be applied within the legislative process. For example, the lack of accessible justification for the amended form of the Septennial Act 1715 resulted in a lack of clarity over the effect of its repeal. In relation to the Speaker's certificate, the lack of clarity over the rules of no confidence procedure made it hard to pin down the precise effect of the attempt to codify it. The basic point is that the better the norm is justified, the clearer its form and the more transparent its purpose, the easier it is for parliamentarians to interpret it for the purposes of scrutinising the constitutional effect of Government Bills. This highlights one of the effects of a heavy reliance on uncoded and under-justified constitutional norms. In an ideal situation, the Government would help to mitigate this difficulty by outlining how the clauses relate to the relevant constitutional norms. It did not, but parliamentarians were able to use constitutional interpretation to scrutinise each of the key clauses within the Bill, and to offer alternative interpretations of the constitutional effect of those clauses; this ensured that by the end of the process the Government's reasoning on the constitutional effect of the main elements of the Bill had developed considerably. This,

ultimately, was the main achievement of the parliamentary constitutional interpretation during the debate. Parliamentarians were able to fill the gap left by the Government's lack of engagement with the existing normative framework, and this provided vital insight into what the Bill sought to do. Without this scrutiny, the process would have not been able to analyse the Government's justification for the constitutional effect of the Bill, and this would have resulted in a process of constitutional change that would be almost impossible to defend.

6. The Value and Character of Parliamentary Constitutional Interpretation

This chapter uses the three preceding case studies to outline the value and character of parliamentary constitutional interpretation. The chapter addresses *how* and *why* the practice contributes to the legislative process and the constitution. Waldron rightly declares that scholars in both law and politics have failed to develop the standards by which the performance of parliamentarians in the legislative process should be judged.¹ The weaknesses of the legislative process in Parliament are well-known, but in order to develop the standards that can guide critical analysis and improve parliamentary performance, the practices that strengthen the process need to be identified and their potential value articulated.

The aim here is to develop an understanding of the potential value of parliamentary constitutional interpretation. Rather than basing this account on abstract ideals, it is built on analysis of how the practice operates. By dissecting the features of the practice and articulating what it achieves, the chapter intends to outline a sense of why it is important and why the realisation of its potential would enhance the legislative process and the constitution. The interpretation of constitutional norms may not, in itself, decide legislative outcomes in Parliament, in the sense that the constitution does not require that the substance of the law conforms to existing constitutional norms.² However, this does not deprive the substance of the constitution of an instrumental role within the parliamentary law-

¹ J Waldron, *The Dignity of Legislation* (CUP 1999) 1.

² D Oliver, 'Constitutional Scrutiny of Government Bills' (2004) 4 Macquarie Law Journal 33, 54.

making process. There is increasing awareness that the majoritarian structure of the parliamentary legislative process does not prevent the substantive content of the constitution playing an important role, particularly in respect to human and constitutional rights.³ This chapter draws on a range of literature on the legislative process, including that on rights, to shape the account of what makes constitutional interpretation valuable.

As Jennings explains, the strength of the majority does not deprive Parliament of the power of effective criticism.⁴ The Government can limit the time available and the influence of scrutiny, but it cannot directly limit the quality of the arguments contained in the speeches, amendments and reports advanced in the parliamentary process. Feldman observes that constitutional norms, including constitutional rights and principles, supply the external standards that make for particularly effective legislative scrutiny.⁵ To scrutinise the constitutional effect of a Bill, Parliament needs to be able to identify, explore and if necessary challenge how any clause interacts with the substance of the constitution before it becomes law. To do this, parliamentarians and parliamentary committees must be able to interpret the norms of the constitution and the constitutional effect of Bills. This thesis argues that this practice is the key active ingredient in Parliament's role in enacting Bills with constitutional effect. This chapter seeks to explain what this activity, when used effectively, can achieve.

³ S Gardbaum, *Commonwealth Constitutionalism* (CUP 2013).

⁴ I Jennings, *Parliamentary Reform* (University of London Press 1934) 36.

⁵ D Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 328.

The structure of the chapter is as follows. The first section sets out the basic features of constitutional interpretation in Parliament. The second section details how the practice raises the level of justification within the legislative process. The third section explains how the practice facilitates a distinct parliamentary involvement in the negotiation of the constitution.

6.1 The character of the parliamentary constitutional interpretation

The context of parliamentary constitutional interpretation is responsible for determining its character, and informs the value of the practice.⁶ The aim of this section is to move beyond the technical question of what counts as parliamentary constitutional interpretation, and instead to focus on how the parliamentary and legislative context informs the distinctive features and characteristics of the practice. The case studies have shown that constitutional interpretation is utilised by a number of parliamentary actors, that it serves to contribute to a number of different communicative purposes within the legislative process, and that a number of factors influence its effectiveness.

6.1.1 Three parliamentary factors

This sub-section highlights three particular aspects of the parliamentary context that are central to the character of the practice. There are many more factors that could be mentioned, but those detailed here are the ones that stood out in the case studies.

⁶ C Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996) 167; C Sunstein and A Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.

The first and most important factor is the nature of the Government's approach to the legislative process.⁷ The parliamentary structure creates an adversarial relationship between the Government on the one hand, and those parliamentarians who are not members of the Government, on the other. The Government is the dominant force in the relationship. But that observation does not paint a complete picture. The nature of the relationship is complicated, and different aspects of the relationship play a key role in influencing constitutional interpretation within Parliament.

If the Government takes a proactive attitude towards the process, by seeking to inform and to engage those involved in scrutiny, then the adversarial nature of the process becomes a strength as the combination of principled argument with disagreement produces an effective scrutiny process. This allows parliamentarians to hold the Government to account for the content of its legislative proposals.⁸ The debate in the House of Lords on the Public Bodies Bill and the Health and Social Care Bill demonstrates this point.⁹ If the Government takes a defensive attitude towards the process, by not providing sufficient information or time to engage in the detail of the Bill, then the adversarial nature of the engagement becomes a weakness, and the capacity for principled scrutiny of the detail is limited. As Hunt explains, the quality of the information provided by the Government to explain the reasoning behind legislative provisions is vital to

⁷ D Feldman, 'The impact of human rights on the UK legislative process' (2004) 25 Statute Law Review 91, 105.

⁸ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (n 5) 328-329.

⁹ See Chapters 3 and 4.

effective scrutiny.¹⁰ The Fixed-term Parliaments Bill shows that a Government in a hurry can squeeze the platform needed for constitutional interpretation to play a significant role.¹¹ The analysis of the constitutional effect of a Bill can often be complicated, and the more time and information given to support the process, the more likely it is that the difficult constitutional questions in the detail of the Bill will be formulated and put to the Government.¹²

One of the most significant manifestations of the strengths and weaknesses of the adversarial system within the legislative process for constitutional interpretation is the role of the Minister responsible for piloting the Bill through the relevant chamber. A strength of this arrangement is that a competent and proactive Minister can transmit the reasoning behind the detail of a Bill. Even though the Minister will not be the one personally responsible for the particular clause in question, the system allows the thinking of those who were responsible, the civil servants, lawyers, and parliamentary counsel, to transmit that information via the Minister into a political, public and transparent forum.¹³ A positive attitude from the Minister will often result in a process whereby the quality of the analysis put to the Government translates into the development of the reasoning offered to justify the Bill. In each of the case studies, the Minister in the Lords showed this element of the process working well. However, this arrangement works badly when the Minister takes a defensive attitude to the process. If the Minister does

¹⁰ M Hunt, 'The Joint Committee on Human Rights' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013) 229.

¹¹ See Chapter 5.

¹² For an account of a slower approach to parliamentary law-making see T Bull and I Cameron, 'Legislative Review for Human Rights Compatibility: A View From Sweden' in M Hunt, H Hooper and P Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart 2014).

¹³ D Greenberg, *Laying Down the Law* (Sweet & Maxwell 2011) 51.

not treat the arguments put to him or her seriously, or does not appreciate the need to develop the substance of the reasoning already put forward, then the presence of disagreement and the adversarial model are not conducive to effective constitutional interpretation or Government accountability, which both rely upon the Government's willingness to develop its case for the clauses within a Bill.

The second factor is bicameralism. Parliamentary constitutional interpretation is very different in the House of Lords from the House of Commons. This is not surprising, but it is worth noting some of the principal distinguishing features. The influence of parliamentary constitutional interpretation witnessed in the case studies is a product of the political context in the current House of Lords. The Government's strategy for navigating legislation through the Lords is fundamentally different from the strategy in the Commons.¹⁴ In the Lords, the Government's negotiating position is often far more open and proactive than in the Commons.¹⁵ As Russell demonstrates, this is the product of the relative weakness of the Government's position. The real possibility of defeat means that the Government in many cases has to 'win the argument' on the substance of the Bill.¹⁶ Another key factor is the absence of the time constraints imposed by the Government on the Commons' legislative scrutiny. The distinct role of the Government within the House of Lords supplies the opportunity for the form of proactive negotiation upon which the practice depends.¹⁷

¹⁴ M Russell, *The Contemporary House of Lords* (OUP 2013) 178.

¹⁵ Ibid.

¹⁶ D Pannick, 'Respect for law and sausages': how Parliament made Section 31 of the Growth and Infrastructure Act 2013 on the sale of employment rights' (2014) 85 *The Political Quarterly* 43, 47.

¹⁷ J Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 *Current Legal Problems* 31, 43-48.

The strength of the House of Lords throws the weakness of the House of Commons into sharp relief. The Government is known to resist changes in the Commons, in anticipation of the more proactive dynamic in the Lords. A notorious example came during the debate on the Prevention of Terrorism Act 2005, which was rushed through the Commons; the Government justified this on the basis that there would be more time in the Lords.¹⁸ Sathanapally reports that there was ‘hostility to the idea that MPs should be satisfied with expected scrutiny in the House of Lords as an alternative to Commons deliberation’.¹⁹ During the debate on the Fixed-term Parliaments Bill, Chris Bryant MP (Labour) complained that the arguments relating to the flaws with the system of Speaker’s certificates were rebutted in the Commons, only to be later accepted in the Lords.²⁰ Saving concessions for the Lords is a common legislative tactic. However, the Bryant complaint shows that the limited impact of the Commons is not due to the lack of principled scrutiny. The basic point is that principled scrutiny requires effective political support. In the Commons, during the critical stage of the process for principled analysis of the detail of a Bill, the Public Bill Committee, it is very difficult for critics of a Bill to garner the necessary support to make the Government take the analysis seriously.²¹

¹⁸ See M Shephard, ‘Parliamentary Scrutiny and Oversight of the British “War on Terror”’: From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions’ (2009) 15 *The Journal of Legislative Studies* 191; F Davis and F De Londras, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 10 *Oxford Journal of Legal Studies* 19.

¹⁹ A Sathanapally, *Beyond Disagreement* (OUP 2012) 200-201.

²⁰ See 5.2.3.

²¹ L Thompson, ‘More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons’ (2012) 66

The third factor is the role of amendments. The bulk of the parliamentary legislative process involves clause-by-clause analysis of the Bill. In the committee and report stages the primary mechanism of scrutiny is through the tabling of amendments. The case studies show that the effectiveness of an amendment depends on the ability to translate legislative reasoning into a competent amendment. Support for a well-argued criticism might be lost if the proponent cannot translate the point into a workable amendment. Defenders of the legislative process stress that one of its strengths is that it approaches political and moral issues free of the technicalities associated with legal reasoning.²² There are reasons to be careful about such claims. After a Bill has passed the second reading stage, the scope of amendments is limited by the parameters of the Bill in both Houses.²³ In the Commons, this is policed closely.²⁴ The general point is that a large proportion of parliamentary debate on a Bill, particularly in the Lords, does not examine competing policy options, but instead analyses the merits of the Bill itself, and whether its clauses are suited to achieving the stated aims. For this reason, the role of ‘technicalities’ should not be underestimated.

The relative technicality of the process means that the ability to draft well-crafted amendments that correspond to the supporting analysis is a central feature of constitutional interpretation in Parliament. In each of the case studies, the ability

Parliamentary Affairs 459; D Greenberg, *Laying Down the Law* (Sweet & Maxwell 2011) 108-109.

²² J Waldron, ‘Judges as Moral Reasoners’ (2009) 7 International Journal of Constitutional Law 2, 19.

²³ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis London 2011) 604 for the rules of on the Lords, 575, 590 and 595 on the Commons.

²⁴ Ibid; Greenberg (n 13) 88-89.

of parliamentarians, for example Peers such as Lord Pannick and Lord Lester of Herne Hill, to translate their concerns into amendments was central to the role of the practice within the process.²⁵ There are a number of points that arise from this feature of the practice. Firstly, amendments can be used as tools to highlight the problems within a Bill and how they can be improved. In other words, if a parliamentarian can show how a constitutional problem should be solved through an amendment, this is likely to strengthen the appeal of the argument relating to the constitutional effect of a Bill, both in relation to the Government and to those who may vote upon it. Secondly, in a related point, an amendment provides a focal point within the debate, something the relevant House or committee can vote upon. This tends to focus the mind of the Government, particularly in the Lords. The real prospect of defeat and amendment is a central part of what makes parliamentary constitutional interpretation relevant to the enactment of a Bill. As Russell explains, it is routine for the delegated powers in a Bill to be amended in the Lords.²⁶ Thirdly, such changes, as occurred in the Public Bodies Bill, depend upon the ability of peers to be able to draft amendments that bolster the constitutional propriety of delegated powers. In other words, this factor shows the significance of legislative expertise. The constitutional analysis of a Bill might be more suited to the process of amendment than general policy analysis, which is limited by the nature of parliamentary debate after the second reading stage. The relative technicality of the process does not make it any less political. On the contrary, in terms of scrutiny, technical legislative skills are a key tool for expanding the basis of disagreement and enhancing political accountability within the legislative process. A targeted amendment can transform what appears to be

²⁵ See for example 3.2.4.

²⁶ M Russell, *The Contemporary House of Lords* (OUP 2013) 218-220.

an innocuous detail of a Bill into an issue of constitutional principle.²⁷ In this sense the quality of the amendments is a crucial part of holding the Government to account for the detail buried within a Bill. These questions will sometimes relate to parts of the Bill that the Government would rather not debate.

None of these factors will surprise seasoned observers of the legislative process. Nonetheless it is important to appreciate how they influence the nature of constitutional interpretation within Parliament. The number of Bills analysed is not large enough to make confident generalisations on which political factors determine the effectiveness of the practice. The case studies were selected to show how the practice contributes to the legislative process in Parliament, but on other occasions during the parliamentary session of 2010-2012 the factors outlined above will have limited the role of constitutional interpretation.

6.1.2 Committees

The case studies have shown that the legislative scrutiny committees in the House of Lords, particularly the Constitution Committee but also the DPRRC, are a key part of how Parliament interprets the constitution. As was noted in chapter one, the nature of the impact of legislative scrutiny committees, particularly the JCHR, has been explored in the existing literature. The aim here is to highlight the institutional features of these committees, evidenced in the case studies, that enhance the practice of constitutional interpretation.

The first institutional feature is the ability to deliver an in-depth analysis of the

²⁷ Greenberg (n 13) 51.

constitutional implications of a Bill within a report published during the early stages of the passage through the Lords. The ability to issue reports on a Bill puts committees in a privileged position within the Parliament-Government dialogue. The report format provides a unique opportunity to use constitutional interpretation in the analysis of a Bill. Each of the Constitution Committee's reports examined in the case studies shows that the Committee uses analysis in their reports that otherwise would not have the opportunity to be heard, as a speech in a debate does not provide the same type of opportunity to set out an analytical position on a Bill. Within a report, a committee is able to address the detail of a Bill using sources and evidence. Further, a report from a parliamentary committee can become a point of reference within parliamentary debate in a way that is more difficult for a speech. This fills an important gap in legislative reasoning within Parliament.²⁸ The ability of a committee (through its clerks and advisers) to write what is effectively an 'essay' or 'judgment' on the constitutional effect of a Bill, means that Parliament has its own internal source of constitutional analysis and is not reliant on the Government or the view of individual parliamentarians. The availability of well-reasoned analysis from a respected parliamentary source creates an opportunity for those on the floor of the House of Lords to respond by proposing amendments. Transmitting sophisticated constitutional analysis from a report to the scrutiny on the floor of the House is a central element of the committees' contribution to the practice of parliamentary constitutional interpretation.

²⁸ M Tushnet, 'Interpretation in Legislatures and Courts; Incentives and Institutional Design' in R Bauman and T Kahana (eds), *The Least Examined Branch* (CUP 2006) 371-372.

The second feature is the prompting of Government responses.²⁹ It is normal practice for a committee report to prompt a direct Government response after the report is published.³⁰ The Government response often shows that those responsible for the Bill, within the Bill team, have contributed to the analysis. Prompting such a response is an important contribution to the legislative process, where information on the Government's position is crucial to the quality of the scrutiny. The Government response to the Constitution Committee's report on the Health and Social Care Bill is a case in point.³¹ Further, the Committee's reports also serve to generate a response from Government indirectly. For example, when peers introduce amendments that directly respond to the points made in the Constitution Committee's reports, this can then prompt an indirect Government response. Examples of this can be seen in the debates on both the Public Bodies Bill and the Health and Social Care Bill.³² The DPRRC prompted a number of amendments, sometimes moved by members of the Committee, during the debate on the Public Bodies Bill. The combination of the ability to issue reports that contain analysis of the content of a Bill and the presence of parliamentarians willing to move amendments to follow up points made is central to how parliamentary constitutional interpretation works within Parliament, and in the House of Lords in particular.

The third feature is the presence of constitutional expertise. Within the Constitution Committee there are two types of experts. First, there are the

²⁹ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (n 5) 333.

³⁰ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 836.

³¹ See 4.2.5.

³² See Chapters Three and Four.

members of the Committee, which in 2010-2012 contained prominent lawyers such as Lord Pannick, and other experts such as Lord Norton of Louth; and second, there are the legal advisers to the Committee who play a central role in producing the analysis within the reports.³³ The JCHR and the DPRRC are both served by a combination of the expertise of their members and their staff. Expertise is particularly important because of the limited capacity of parliamentarians, in the sense that they are ‘part-time legislators’ who fulfil many other roles, and because of the lack of professional legal expertise available to parliamentarians within Parliament.³⁴ The concentration of this expertise is central to the quality of the analysis, which is able to build the reputation of a committee, and to provide a reference point for amendments moved in the Committee and Report stages.

The fourth feature is the ‘legisprudence’ of the reports of each Committee.³⁵ The absence of a codified constitution has made the Constitution Committee’s remit more difficult than it might otherwise have been. Over the course of the past ten years it has built up a considerable body of constitutional analysis, upon which it can draw to facilitate its scrutiny. The most prominent example of this practice covered in the case studies came in the Committee’s report on the Public Bodies Bill, which drew on its previous report on the Legislative and Regulatory Reform Bill.³⁶ The ability of the Constitution Committee to build precedents has enabled

³³ A Le Sueur and J Simson Caird, The House of Lords Select Committee on the Constitution in A Horne, G Drewry and D Oliver (eds) *Parliament and the Law* (Hart 2013).

³⁴ Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ (n 5) 327.

³⁵ D Oliver, ‘Improving the Scrutiny of Bills: the Case for Standards and Checklists’ [2006] Public Law 219, 243.

³⁶ See 3.2.1.

the Committee to mitigate some of the challenges of interpreting the UK constitution.

6.1.3 The interpretability of constitutional norms

Interpretability is a term borrowed from an article by Melton, Elkins, Ginsburg and Leetaru who ‘define the interpretability of law’ as ‘the ability to produce inter-subjective agreement about the meaning of a text’.³⁷ Or, in other words, Melton et al are concerned with judging the accessibility of constitutional rules. They point out that it is a basic requirement of the rule of law that constitutions should not be difficult to interpret, and furthermore that a lack of clarity will reduce the likelihood of effective enforcement. There is a range of identifiable benefits attached to a constitution that is made up of norms that are accessible and suited to interpretation in a variety of institutional contexts.

Interpretability is a key term for understanding the character of parliamentary constitutional interpretation. In each of the three case studies the interpretability of the norms influenced the role of constitutional interpretation within the parliamentary process. There are a number of factors identified in the case studies, which appear to affect interpretability.

All constitutions present interpretive challenges; the absence of codification sometimes makes the process of interpreting the United Kingdom constitution particularly difficult. The precise implications stemming from the absence of

³⁷ J Melton, Z Elkins, T Ginsburg and K Leetaru, ‘On the interpretability of law: lessons from the decoding of national constitutions’ (2012) 43 *British Journal of Political Science* 399, 400.

codification are hard to identify. Bogdanor says that the constitution has changed from a 'system of tacit understandings' to 'a system where the rules are increasingly clear and are consistently articulated within Parliament'.³⁸ Even if this is correct, the absence of codification means that the use of constitutional interpretation and the understanding of the constitution is less widespread and more reliant on a limited number of experts than it would be if the constitution was the product of a constitutional convention and more ingrained in the political culture. The absence of a codified constitution means that the norms of the constitution are less well-known and less prominent in political debate than they would be if the United Kingdom had a codified constitution.

As a consequence of the absence of codification, many of the constitutional norms that are interpreted are found in the statute book.³⁹ In some situations, this aids interpretability, for example in the comparative analysis between the Legislative and Regulatory Reform Act 2006 and the Public Bodies Bill. In that situation, the strength of the debate on the 2006 Act and the principles behind the concessions secured were able to inform the interpretation of the Public Bodies Bill. However, in relation to both the Fixed-term Parliaments Bill and the Health and Social Care Bill the obscurity of the provisions being replaced, and the absence of identifiable authoritative analysis to explain the reasoning behind them, presented a major challenge for the debate on the relevant clauses of both Bills. This raises the point that it is not necessarily the absence of codification that weakens interpretability, but rather the absence of authoritative and accessible material to explain the basic

³⁸ V Bogdanor, *The New British Constitution* (Hart 2009) 276-290.

³⁹ R Hazell, 'Time for a New Convention: parliamentary scrutiny of constitutional bills 1997-2005' [2006] Public Law 247, 247.

principles and reasoning which lie behind the norm in question. Many statutory provisions have broader constitutional principles imbedded in their purpose; the key is to be able to identify them.⁴⁰ The absence of *travaux préparatoires* or more detailed preambles does not help the situation. Explanatory notes can help, but often they add little to the text of the Bill, in the sense that they explain the clause rather than explain the reasoning behind it.⁴¹ The general point is that the accessibility and interpretability of a Bill is not just a question of drafting, but it is also a question of how the Bill is communicated.⁴² The quality of the justification offered by the Government can make a difference to the way that the relevant legislation operates within the political sphere. This means that the parliamentary constitutional interpretation that precedes enactment can enhance the interpretability of statutory provisions, and I return to this point below (6.2.3), as this is a key value of the practice.

Another important factor in relation to interpretability for the purpose of parliamentary constitutional interpretation is the subject matter of the norm. In the case study on the Public Bodies Bill, it was clear that parliamentary actors could harness their insight into the norms that underpin the parliamentary law-making procedure in order to analyse the constitutional effect of the Henry VIII powers in that Bill. Certain parliamentarians and committees are able to use their awareness of their own constitutional role in the legislative process to supply the standards for the principled scrutiny, which is defined as constitutional interpretation in this

⁴⁰ H Isol-Miettinen, 'The Principled Legislative Strategy: Rationality of Legal Principles in the Creation of Law?' in L Wintgens and A Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Ashgate 2013) 33-52.

⁴¹ Greenberg (n13) 230-231.

⁴² W Voermans, 'Styles of Legislation and Their Effects' (2011) 32 Statute Law Review 38, 49.

thesis.

The final point is that some norms are hard to interpret both because they are uncodified *and* there is a lack of an authoritative body of interpretation to build upon. The interpretation of the confidence procedure during the debate on the Fixed-term Parliaments Bill was challenging because the convention was uncodified and had been used infrequently. The passage of that Bill also showed how authoritative interpretation enhances the nature of constitutional interpretation during debate. The Clerk of the House of Commons' intervention on parliamentary privilege provoked a large amount of effective scrutiny of the elements of the Bill relevant to that constitutional principle.⁴³ Equally, if there is a body of case law that may be drawn upon, this will also enhance the interpretability, and this is shown in the Clerk's intervention during that debate. Many of the most important constitutional norms for the purposes of the legislative scrutiny are rarely interpreted by the courts, and this means that in many cases parliamentarians have to look elsewhere for authoritative sources of interpretation.

6.1.4 Political constitutional interpretation

This sub-section argues that parliamentary constitutional interpretation is political by character, despite its reliance upon both constitutional principles and legal or legislative analysis. The process of constitutional interpretation or 'principled scrutiny' raises important questions about the balance of law and politics in the legislative process.

⁴³ See 5.2.3.

Feldman argues that principled legislative scrutiny is separate from examining the policy merits of a particular Bill.⁴⁴ Feldman separates scrutiny into three types: scrutiny of the policy objectives, scrutiny of mechanisms for achieving those objectives, and scrutiny of drafting.⁴⁵ Scrutiny of policy objectives is described as ‘essentially political’, whereas scrutiny of the mechanisms to meet those objectives is said to combine political and technical considerations. Horrigan, writing about constitutional rights scrutiny in Australia, explains the division in the following terms:

At a broad level, we can easily distinguish between Parliament’s political decision about the merits of any proposed rights-infringing legislation and a lawyer’s legal decision about whether and how a proposed law affects rights in terms of standards established in legal benchmarks like bills of rights and precedents. For this purpose, the decision that proposed legislation does or might infringe a right is the relevant legal decision. The decision that any such infringement is justified is the relevant political decision.⁴⁶

The case studies support Feldman and Horrigan’s analyses in the sense that constitutional interpretation relies upon what may be described as ‘technical’ or ‘legal’ or ‘legislative’ analysis. However, within the practice of parliamentary constitutional interpretation these elements cannot be cleanly separated. Almost

⁴⁴ Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ (n 5) 332.

⁴⁵ Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ (n 5) 336-338.

⁴⁶ B Horrigan, ‘Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making’ in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without A Bill of Rights* (Ashgate, 2006) 81.

all of the examples of the practice examined in the case studies are directed to the question of whether the constitutional effect of a clause is justified. The absence of legal analysis in the form referred to by Horrigan and Feldman might be as a result of the exclusion of the interpretation of rights from the case studies, but even in the rights context drawing such a clear distinction seems problematic. The analysis of the merits of a clause is *informed* by technical legislative analysis, but this does not trump the overall political character of constitutional interpretation within the parliamentary context. The contributions of parliamentarians and committees during the legislative process are directed to the question of whether the Bill should be enacted in its existing form. The parliamentary legislative process is a forum whereby the Government should be held to account, by testing the strength of their case for changing the law. Within a forum of political accountability, it is hard to regard any input into that process as non-political in character, even if it is not political in the sense of being party-political. If law forms part of politics, as Loughlin suggests, then constitutional and legal analysis should be regarded as part of, rather than separate from, politics within the legislative process in Parliament.⁴⁷

The danger with Horrigan's analysis is that it implies that the legal analysis of whether a Bill conforms to constitutional standards is a non-political form of analysis. On this point, Dworkin's analysis of constitutional interpretation by judges is instructive.⁴⁸ The relevant constitutional norm provides certain limits as

⁴⁷ M Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000) 6.

⁴⁸ R Dworkin, *Freedom's Law* (Harvard University Press 1996) 1-38; For a helpful analysis of Dworkin see T Gyorfi, 'In Search of a First-Person Plural,

to how it can be interpreted, but within those limits there are a number of possible interpretations that will be possible.⁴⁹ The interpretation that is chosen will depend on how the interpreter understands the political arguments that underpin the relevant principles. For example, the question of whether a particular Henry VIII power is adequately framed will be informed by how the interpreter views the nature of the relationship between Parliament and Government that underpins the relevant norms. As constitutionality is not a condition of legality within the UK, to argue that constitutional norms should be respected within a Bill is to endorse the political logic of the relevant norms. In this sense constitutional interpretation is not an apolitical form of analysis, even if it is technical in the sense that it relies upon analysis of constitutional (including legal) norms. The general point is that constitutional interpretation, whether it is viewed as objective or subjective, cannot be regarded as divorced from questions of politics.

Parliamentary constitutional interpretation is not used to support determinations of questions of law in the same way that constitutional interpretation is used in the judicial context. The legislative process is forward-facing. Assessing the future effects of a proposed Bill is difficult to predict.⁵⁰ In the absence of constitutional laws that set boundaries of legality, the answer to the question of how a Bill might fit within the wider constitutional framework is unlikely to be straightforward. This is reflected in the fact that the view of an individual parliamentarian or a parliamentary committee does not in itself decide the meaning of the constitution.

Second-Best Theory of Constitutional Interpretation' (2013) 14 German Law Journal 1077.

⁴⁹ R Dworkin, *Freedom's Law* (Harvard University Press 1996) 8-11.

⁵⁰ S Laws, 'Legislation and Politics' in D Feldman (ed), *Law in Politics, Politics in Law* (Hart 2013) 99-102.

The Constitution Committee and parliamentary actors approach the task of assessing the constitutional effect of a Bill without the burden of having to make an authoritative judgment. A parliamentary committee, according to Feldman:

... approaches the constitution on the footing that it may have multiple meanings or, to be more accurate, that it is not the committee's job to make an authoritative choice between meanings; and its work and reports are conducted accordingly. By contrast, a constitutional court must make an authoritative choice between possible constitutional interpretations, and may therefore have to consider carefully the practical consequences of interpreting the relevant provisions in one way rather than another.⁵¹

Even if one objective answer is possible, it would not, of itself, determine the outcome of the parliamentary legislative process. This flows from the fact that constitutional interpretation in Parliament does not formally trump other political questions. In this sense, it remains only part of the political process of deciding what the content of the law should be.

This particular political character of the practice of constitutional interpretation is also a product of parliamentary sovereignty. As Goldsworthy points out, parliamentary supremacy can and does co-exist with constitutional norms that influence legislative decision-making.⁵² The key distinction is that the absence of any special legal status means that parliamentary constitutional interpretation has to compete in the same way as every other form of legislative politics. This

⁵¹ D Feldman, 'Factors affecting the Choice of Techniques of Constitutional Interpretation' in Ferdinand Mélin-Soucramanien (ed), *L'Interprétation Constitutionnelle* (Dalloz 2005) 4-5.

⁵² J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 302-303.

ensures that questions of constitutionality and the use of constitutional interpretation remain open to disagreement.⁵³ While to some this might be a weakness, it may also be understood as a strength of this form of the practice. Parliamentary supremacy leaves the content of the constitution open to renegotiation through the legislative process.⁵⁴ While this leaves the norms that underpin democracy and the constitution vulnerable, it also presents parliamentarians with the opportunity to engage with the norms of the existing constitution as part of the ordinary legislative process. When they are asked to consider a Bill with constitutional effect, parliamentarians are presented with the responsibility to assess existing arrangements and the proposal to change them. This allows parliamentarians to engage with the existing constitution in a way that would not be possible if constitutional norms were taken outside of the legislative process, via constitutional entrenchment or strong judicial review.⁵⁵

The practice of parliamentary constitutional interpretation, as described in the case studies, shows that parliamentarians can take the rules of the constitution seriously despite parliamentary supremacy. It is possible to leave the rules of the constitution open to change through the ordinary legislative process and to have certain expectations of how that process should be conducted. By including parliamentary constitutional interpretation as part of its ‘constitutional machinery’, through the committee structure, Parliament has shown that

⁵³ J Waldron, *Law and Disagreement* (OUP 1999) 310-312.

⁵⁴ G Gee and G Webber, ‘What is a political constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273.

⁵⁵ Strong judicial review refers to the form of review whereby a court holds the power to invalidate primary legislation, and the legislature holds limited power to override court decisions see: M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2007).

parliamentary constitutional interpretation and parliamentary supremacy can co-exist. The Government or Parliament may not always meet the standards expected, but in principle, the two are not mutually incompatible.

The practice of parliamentary constitutional interpretation is defined by the recognition that there is a category of constitutional norms that are relevant to the content of legislation, but which do not have special legal status and therefore do not trump, in any formal sense, other concerns within legislative deliberations. They must compete with other concerns for attention, but they do benefit from having specialist legislative committees dedicated to interpreting and applying them to legislative proposals. The Government knows that the constitutional effect of a Bill is likely to attract comment from a committee capable of using constitutional interpretation effectively. Thought of in this way, the practice provides an extra deliberative hurdle for a Government to face in the legislative process. An individual's view on the value of the practice is likely to depend on what someone considers to be the appropriate balance 'between deliberation and inclusiveness on the one hand, and expeditiousness and decisiveness on the other'.⁵⁶ The value to this particular balance is that it creates a significant role for constitutional interpretation within the legislative process, but without the cost of artificially elevating constitutional reasoning above ordinary legislative politics.

6.2 Justification

The first element of the value of parliamentary constitutional interpretation is that it serves to enhance the level of justification during the legislative process. There

⁵⁶ I Bar-Siman-Tov, 'Lawmakers as Lawbreakers' (2010) 52 William and Mary Law Review 805, 816.

is increasing recognition that constitutionalism, in any shape or form, should result in a ‘culture of justification’ within the legislative process in a Parliament or legislature.⁵⁷ This recognition has occurred in a number of different academic disciplines: through political theorists writing on ‘deliberative democracy’ and the relationship between deliberation, justification and legitimacy;⁵⁸ constitutional lawyers articulating with the role of constitutional rights within the legislative process;⁵⁹ and legal theorists critically engaging the role of the legislative process and parliamentary debate.⁶⁰ This section puts forward the argument that the interpretation of all forms of constitutional norms, and not just rights, plays a major role in the process of justifying the constitutional effect of a Bill prior to enactment, and that this contributes both to the legitimacy of the legislative process and to the relevance of constitutionalism to the legislative process.

6.2.1 Justification and parliamentary law-making

All legislatures, including the UK Parliament, make law in a way that does not meet the expectations of deliberative democrats or constitutional theorists.

⁵⁷ E Muranick, ‘A Bridge to Where?: Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31, 32; see also D Dyzenhaus, ‘Law as Justification: Etienne Muranik’s Conception of Legal Culture’ (1998) 10 *South African Journal of Human Rights* 11; D Dyzenhaus, ‘Are Legislatures Good at Morality? Or Better at it than Courts?’ (2009) 7 *International Journal of Constitutional Law* 46; D Dyzenhaus, ‘Aspiring to the rule of law’ in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 209.

⁵⁸ G Gaus, *Justificatory liberalism: an essay on epistemology and political theory* (OUP 1996); E Rossi, ‘Legitimacy, Democracy and Public Justification: Rawls Political Liberalism Versus Gaus’ *Justificatory Liberalism* (2014) 20 *Res Publica* 9.

⁵⁹ M Hunt, ‘Reshaping constitutionalism’ in Morison, K McEvoy and G Anthony (eds) *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (Oxford, OUP 2007).

⁶⁰ L Wintgens and A Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Ashgate 2013).

However, evidence of weak performance should not deter those who argue that deliberation and justification matter from making the case for how a legislature should enact legislation. This sub-section outlines the basic arguments to support the view that what parliamentarians do to contribute to justification is particularly significant to the legitimacy of the legislative process. Legitimacy is not, as Nicol puts it, an ‘all-or-nothing affair’.⁶¹ The purpose of using it as a tool of analysis is to determine what forms of conduct are relevant to reaching a higher standard of process than that which is achieved by simply complying with the basic rules or expectations. In this sense the value of the idea of legitimacy is that it allows observers of a process to work out the standards of conduct that go beyond those articulated by the internal regulations of the institution.

Treating parliamentary deliberation and justification as relevant to the legitimacy of the legislative process is based on the idea that the legislative process is more than a mechanical process for aggregating preferences and political bargaining. It is certainly the case that, in certain circumstances, legislatures operate like a ‘counting machine’, whereby what is said during debate appears to make little or no difference to the final result.⁶² Close examination of the legislative process in Parliament shows that, even though the aims of legislative policy are generally not decided during the parliamentary legislative process, a good deal of parliamentary debate is dedicated to analysing how the clauses within a Bill should achieve the ends which were voted upon at the second reading stage. It is in these circumstances that the justification of how a Bill fits within the existing

⁶¹ D Nicol, *EC Membership and the Judicialisation of British Politics* (OUP 2001) 17.

⁶² P Yowell, ‘Practical Reason and the Separation of Powers’ (unpublished DPhil thesis Oxford University 2010) 71.

constitutional framework becomes particularly important. Dworkin, Rawls and Waldron all recognise that ensuring that legislative proposals are shown to ‘fit’ with constitutional fundamentals is central to both legitimacy and integrity of a constitutional system. In *Law’s Empire*, Dworkin argues that integrity demands that legislative proposals should fit with the principles of a constitutional system.⁶³ In *Political Liberalism*, Rawls puts forward a conception of public reason, which states that the liberal principle of legitimacy requires that exercises of public power, including legislative power, should be shown to conform to the principles and ideals within a constitution.⁶⁴ Waldron argues that legislators act with integrity, when they engage with the principles that underpin the constitutional system.⁶⁵ It is dangerous to assimilate these points, as each rests on complex foundations, but they all support the view that parliamentarians should use their position within the law-making process to question the extent to which any legislative proposal conforms to the existing constitutional framework. The integrity and the legitimacy of a constitutional system depend upon the normative ingredients of that system being used to frame legislative debate. If this is a proper function of the legislative process, then it should be seen as a forum for testing the coherence of a legislative proposal, as well as serving to aggregate preferences. Or, as Yowell explains, ‘the authority of the legislature cannot be reduced to either deliberation or voting’; it depends on both.⁶⁶

⁶³ R Dworkin, *Law’s Empire* (Hart 1998) 217-219.

⁶⁴ J Rawls, *Political Liberalism* (Columbia University Press 1996) 217-218.

⁶⁵ J Waldron, ‘Legislating with Integrity’ (2003-2004) 72 *Fordham Law Review* 373.

⁶⁶ Yowell (n 62) 163.

Parliamentary constitutional interpretation is the activity used within the UK Parliament to resolve questions relating to how a legislative proposal fits with the existing constitutional framework. In order to appreciate why this raises the level of justification within the legislative process and why this is important, the legislative process needs to be seen as a forum of justification. Webber states:

The theory of parliamentary democracy conceives of the legislative forum as a forum of justification. Through the exchange of reasons, legislators seek to justify to each other why the proposition for legislative action they favour should be adopted by the assembly... The legislature's activity in debating bills and motions, in enacting, amending and repealing law, in questioning the performance of the executive, all testify to the legislature as a forum of justification.⁶⁷

This presents a balanced account of what the legislative process can achieve. Webber does not pretend that deliberation will always improve the output of the legislative process or that it should aim to produce consensus, as some deliberative democrats claims.⁶⁸ The legislative process is understood as having the *potential* to act as a deliberative and justificatory forum, rather than to claim that the processes or constitutional norms themselves actually guarantee anything. This corresponds with Webber's account of the constitution as an 'activity'.⁶⁹ Webber rebuts the notion that constitutional rights should be conceived as shields against legislation, and instead argues that in a democratic constitutional state, the legislature is charged with specifying the rights in the constitution through legislation. This approach can be extended to constitutional norms that are not

⁶⁷ G Webber, *The Negotiable Constitution: on the Limitation of Rights* (CUP 2009) 150.

⁶⁸ J Waldron, *The Dignity of Legislation* (CUP 1999) 152.

⁶⁹ Webber (n 68) 13.

constitutional rights - understood in the sense that the constitution is not an end state or a completed project, but an activity that is constantly being renegotiated via the legislative process. If the constitution is an ‘activity’ and the legislative process is the primary process by which it is specified, then this also suggests that justification is a vital part of the legislative process, because it is needed to explain how the norms of the constitution relate to the legislative proposal in question.

To return to the central point for this sub-section, justification enhances the legitimacy of the legislative process because it represents a basic standard of legislative reasoning. For legislative deliberation to create ‘a culture of justification’ it must engage with the detail of the legislative proposal. Justification is not just about advancing reasons that support why a Bill should be enacted, it also demands that those reasons be engaged with and contested before a Bill becomes law. Parliamentarians should test the strength of the reasoning behind the Bill. Justification demands that the reasoning behind a Bill is challenged so that more than one account of a Bill is heard within the political process before it is enacted.⁷⁰ To summarise, the idea that the legislative process should aspire to be a ‘forum of justification’ means that parliamentarians’ deliberation should focus upon the substance of the legislative proposal at hand, and should seek to challenge the reasons put forward by those responsible for the proposal. Put simply, if parliamentarians achieve this then they enhance the legitimacy of the legislative process.

⁷⁰ P Petit, *Republicanism* (OUP 1999) 189.

Some go further and claim that the legitimacy of the law itself, and not just the process as is claimed here, is related to the content of parliamentary deliberations that precede enactment. Oliver-Lalana argues that:

The legitimacy of laws cannot solely derive from certain procedural conditions (legality), but it is also bound to the rationality of the argumentation that justifies them, that is, to parliamentary argumentation.⁷¹

This perspective on deliberation relies upon seeing parliamentary argumentation as ‘aiming for justification’ and should be assessed ‘as a pattern for legislative rationality and legitimacy’.⁷² This understanding of the object of the legislative process is close to the position that is outlined in this chapter. Justification is a reasonable and realistic goal for legislative deliberation in Parliament. Regardless of the Government’s strength within Parliament, the process should be seen as providing an opportunity for participants to contribute to the justification of the enactment of the Bill, by both defending and criticising the reasons advanced for supporting the effect of the Bill.

The idea that Parliament’s deliberation should aspire to justify the content of a legislative proposal is not merely academic or theoretical. In the case of *Hirst (no2)*, the European Court of Human Rights (ECtHR) stated that the absence of effective parliamentary deliberation on the enactment of an automatic blanket ban on prisoner voting was relevant to finding that ban to be disproportionate:

⁷¹ A Daniel Oliver-Lalana, ‘The sources of legitimacy of political decisions: between procedure and substance’ in L Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Ashgate 2005) 239.

⁷² Ibid.

There is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote... it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.⁷³

The proportionality analysis used by courts to assess the compatibility of legislation makes the presence, or the absence, of justification for legislation during the legislative process a justiciable issue. According to Kumm, the use of proportionality institutionalises the idea that the legitimacy of law is ‘plausible only if the law is demonstrably justifiable to those burdened by it in terms that free and equals can accept’.⁷⁴ Another example of this practice is the principle of ministerial estoppel as referred to in *Wilson (no2)*, which says that the Government should not rely in judicial review proceedings upon an interpretation of legislation which is incompatible with an explanation given by the Government during the debate which precedes enactment.⁷⁵ In *Animal Defenders* in the House of Lords⁷⁶ and the ECtHR⁷⁷ the presence of extensive deliberation on the question of freedom of speech was referred to as a factor relevant to the judgment that the

⁷³ *Hirst v United Kingdom (no 2)* (2006) 42 E.H.R.R. 41 para 79.

⁷⁴ M Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review’ (2010) 4 Law & Ethics of Human Rights 142, 143.

⁷⁵ *Wilson v First County Trust Ltd (No 2)* [2003] UK HL 40 para 113.

⁷⁶ *Animal Defenders International* [2008] UKHL 15 [33],

⁷⁷ *Animal Defenders International v United Kingdom* [2013] E.M.L.R 28 para 115-116.

interference with the right was proportionate.⁷⁸ Hunt, Hooper and Yowell report that the JCHR's criticisms of the Government's inadequate justification of the derogation that accompanied the Anti-terrorism, Crime and Security Act 2001 formed an important part of the Appellant's arguments in the *Belmarsh* case.⁷⁹ They argue that it was significant that such evidence was not 'improper'.⁸⁰ In a number of different contexts, constitutional norms serve as the basis for demanding that the Government should offer a certain standard of justification for their actions. Constitutional norms provide a framework for analysing the Government's justification for legislative proposals. Returning to the parliamentary context, the Constitution Committee has often asked the Government for a particular level of justification for departures from constitutional principle.⁸¹ For example, in its report on the Banking Bill, the Committee stated that retrospective provisions should only be used when there is a compelling reason to do.⁸²

For the purpose of the claims made here, it is sufficient to acknowledge that the nature of the deliberation within the legislative process, the actions of parliamentarians, can enhance the legitimacy of the legislative process. By contributing to the increasingly prominent standard of justificatory accountability, whereby the Government is held to account for the detail of its legislative proposal and the arguments it puts forward to support that detail, parliamentary

⁷⁸ See A Kavanagh, 'Proportionality Parliamentary Debates: Exploring Some Forbidden Territory' (2014) *Oxford Journal of Legal Studies* 1.

⁷⁹ M Hunt, H Hooper and P Yowell, *Parliaments and Human Rights* (AHRC 2012) 58; *A v Home Secretary (No. 1) (Belmarsh)* [2004] UKHL 56.

⁸⁰ *Ibid.*

⁸¹ See 3.2.1.

⁸² House of Lords Select Committee on the Constitution, *Banking Bill* (HL 2008-09 19) para 7.

constitutional interpretation enhances the legitimacy of the enactment of a Bill with constitutional effect. The practice creates a connection between the substance of the constitutional effect of the legislation being proposed and the process by which the legislation will be enacted. Justification is the source of that connection.

6.2.2 Justifying the constitutional effect of a Bill

A Bill with constitutional effect creates distinct justificatory demands upon the legislative process. A central claim of this Chapter, and of this thesis, is that parliamentary constitutional interpretation is the form of justification that can meet those demands and therefore enhance the legitimacy of the process of enacting Bills with constitutional effect. This sub-section outlines the reasons why the justification of the constitutional effect of a Bill, through constitutional interpretation, is so important to the legislative process and the UK constitution. One of the functions of a constitution is to supply a normative framework, which can enhance the deliberation during the legislative process.⁸³ Constitutional norms enable legislators to identify those legislative proposals that have the potential to alter the existing constitutional settlement. The idea that the process of enacting legislation with constitutional effect, or amending a constitution, should be qualitatively different from other forms of legislative change is familiar to constitutional democracies that have codified and supreme constitutions. The logic of creating distinct procedural hurdles and constraints is that they might increase the likelihood that the proposal will be deliberated carefully and

⁸³ C Eisgruber, *Constitutional Self-Government* (Harvard University Press 2001) 44.

properly.⁸⁴ However, this same logic is not necessarily incompatible with the UK constitution simply because it does not have either a formal process for amending the constitution, nor a power for courts to strike down primary legislation on the basis of departing from the norms of the constitution. The UK constitution can still be structured in such a way that constitutional questions receive distinct treatment, commensurate with their significance, *within* the ordinary legislative process. The legitimacy of the process of enacting legislation with constitutional effect, be it in the form of formal amendment procedure or via the ordinary legislative process, is not purely dependent on sticking to the relevant rules, but rather also depends on how those who participate in the process act - in particular, how they examine and debate the substance of the proposal in question. As the previous sub-section argued, this applies to all legislative proposals. In this sub-section I build on this general point and argue that justification is particularly important for the legitimacy of the process of enacting a Bill with constitutional effect.

Parliamentary constitutional interpretation is a form of reasoning that provides a practical tool that parliamentarians can use to respond to the particular challenge of examining and enacting a Bill which effects the norms which constitute the democratic process in which they are participating. The principal value of constitutional interpretation in this context is that it can be used to identify the reasons that explain the constitutional effect of the Bill. Revealing those reasons is how the process can meet the standard of justification. Nicol captures the point that the legitimacy of the process is determined by whether there is a connection

⁸⁴ D Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 88 *The American Political Science Review* 355, 356.

between the substance of a Bill with constitutional effect and the content of the deliberation that precedes enactment, when he says:

The greater the enormity of the constitutional change legislators are asked to sanction, the greater should be their understanding of its implications.⁸⁵

While ideally all parliamentarians should treat any legislative change with due care and seriousness, one of the distinguishing features of a Bill with constitutional effect is that it can ask parliamentarians to sanction a change to the rules of the political system in which they are participating. This coincidence of interests, however remote, is central to what makes the justification, which can be achieved via parliamentary constitutional interpretation, particularly significant to the legitimacy of the process. Firstly, as those responsible for participating in the democratic law-making process, parliamentarians have a responsibility to show a degree of care in relation to that existing process, in the sense that they should be able to use the knowledge and experience of the internal normative order in their analysis of the substance of constitutional change.⁸⁶ That knowledge and experience can be directed through parliamentary constitutional interpretation. Secondly, the potential risks associated with any majority altering the constitution to suit its own ends are great, and this means that parliamentarians should challenge the reasoning behind the constitutional effect of a Bill, to check that short-term political interests do not result in a weakening of the democratic credentials of the constitution.⁸⁷ As Brest notes, it seems reasonable to demand that the law-making process take explicit account of the constitutional values

⁸⁵ Nicol (n 61) 13.

⁸⁶ N MacCormick, 'The Dialectic of Might and Right: Legal Positivism and Constitutional Change' (1998) 51 *Current Legal Problems* 37, 55-56.

⁸⁷ J Elster, 'Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment' (2003) 81 *University of Texas Law Review* 1751, 1776-1779.

threatened by pending legislation.⁸⁸ In particular, parliamentarians should be watchful to ensure their own role is not diminished. This was precisely the scenario during the debate on the Public Bodies Bill, where the Henry VIII powers within the Bill were designed to circumvent the primary law-making process in Parliament. The responsibility for protecting constitutional rights is shared with the courts, but Parliament has the primary responsibility for ensuring that the norms that underpin the legislative process are reflected in the legislation it enacts. Thirdly, the vulnerability of the UK constitution to change by the political majority of the day makes it especially important that parliamentarians identify the constitutional effect in any Bill introduced to Parliament, so that the democratic credentials of the constitution are not eroded without public debate. The scenario of possible departure from or change to existing constitutional norms makes the justification supplied by effective parliamentary constitutional interpretation especially valuable to the legislative process.

The regular practice of parliamentary constitutional interpretation, in particular through the combined work of committees and Peers on the floor of the House of Lords, creates a distinct track for constitutional issues within the legislative process. Informal channels of constitutional debate serve the same ends as formal channels, such as constitutional amendment procedures, which promote commitments to constitutional and legal clarity.⁸⁹ The use of constitutional norms to frame legislative debate in this track focuses justification upon aspects of a Bill that may not be significant in a party political sense, but should be debated. In this

⁸⁸ P Brest, 'The conscientious legislator's guide to constitutional interpretation' (1974-1975) 27 *Stanford Law Review* 585, 588.

⁸⁹ R Dixon, 'Constitutional Amendment Rules: A Comparative Perspective', (2011) Chicago Public Law and Legal Theory Working Paper No. 347, 98.

sense, one of the contributions of the practice is to contribute to disagreement on aspects of legislation that might otherwise not attract political attention.⁹⁰ In this sense, the practice of constitutional interpretation uses the norms of the constitution to identify aspects of a Bill that ought to be given attention during the legislative process.⁹¹ Each of the case studies demonstrated this feature of parliamentary constitutional interpretation. The Health and Social Care Bill is perhaps the best example. The norms of the constitution, namely individual ministerial responsibility and the existing statutory regulation of the relationship between the Secretary of State for Health, the National Health Service and Parliament, served as an analytical prism for identifying a potential issue within the Bill that might otherwise have been overlooked.⁹²

At its most effective, parliamentary constitutional interpretation is used by multiple parliamentary actors to challenge the Government's justification for the constitutional effect. The presence of a range of interpretive accounts of the constitutional effect of a Bill makes it more likely that the strongest reasons for enacting the change will be identified prior to enactment.⁹³ Parliamentary constitutional interpretation is a form of reasoning that can be used to create a form of Socratic contestation between alternative interpretive accounts of the constitutional effect of a Bill.⁹⁴ This competition between alternative interpretive

⁹⁰ R Rawlings, 'Legal politics: the United Kingdom and ratification of the Treaty on European Union: Part 2' [1994] Public Law 368, 391.

⁹¹ M Goldoni, 'Constitutional Reasoning According to Political Constitutionalism' (2013) 14 German Law Journal 1053, 1074.

⁹² See 4.2.

⁹³ R Dworkin, *Law's Empire* (Hart 1998) Chapters 2 and 3.

⁹⁴ M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 142; See 3.Conclusion.

accounts is the ideal that the culture of justification represents. For the interpretive accounts to make a justificatory impact, the Government needs to take them seriously. During Parliament's consideration of the Fixed-term Parliaments Bill, the presence of competing accounts of impact of the Bill upon Parliament's legislative capacity did not produce many amendments to the substance of the Bill, but it did prompt the Government to significantly develop its reasoning for the Bill.⁹⁵ Even those arguments that did not prompt much direct Government response and were rejected without a well-reasoned explanation served to draw attention to the reasoning that the Government did not accept, and therefore by process of elimination shed some light on the reasoning behind the constitutional effect of the Bill. Identifying the strongest reasons to support the constitutional effect of a Bill is important because it enhances the transparency of the Bill and the norms of the constitution.⁹⁶ This contribution to transparency is particularly worthwhile for legislation that can alter the normative basis of the constitution. One of the principal findings from the case studies was the way in which the parliamentary constitutional interpretation that precedes the enactment of a Bill can inform how subsequent parliaments engage with the resultant provisions. Voermans' observation that the effectiveness of legislation depends on how it is communicated, as well as how it is drafted, seems particularly apposite here.⁹⁷ For the purposes of political forms of interpretation, which are not constrained by

⁹⁵ See 5.2.1.

⁹⁶ D Feldman, 'Parliamentary scrutiny of legislation and human rights' (n 5) 333; R Dixon, 'Constitutional Amendment Rules: A comparative perspective', (2011) Chicago Public Law and Legal Theory Working Paper No. 347, 98.

⁹⁷ W Voermans, 'Styles of Legislation and Their Effects' (2011) 32 Statute Law Review 38, 49.

Pepper v Hart,⁹⁸ parliamentary reasoning is a vital interpretive aid. The level of justification that precedes an enactment, for example the Legislative and Regulatory Reform Act 2006, will improve the ability of its provisions to act as the basis of constitutional analysis.⁹⁹ If the strongest reasons for the constitutional effect of a Bill are identified, then even if they are not apparent on the face of the Bill, those reasons can inform how that legislation is interpreted in a political context.

The final point about the value of constitutional interpretation as a form of justificatory reasoning in the legislative process is that it can make an impact upstream in the legislative process; in other words, it can affect the Government's approach to legislation at an earlier stage.¹⁰⁰ The presence of committees dedicated to the interpretation of human rights and constitutional norms are central to this 'upstreaming' effect. However, it is important to emphasise that it is the use of constitutional interpretation, the substance of both the committees' legislative reasoning and those within Parliament who respond to the committees' arguments in their scrutiny of the detail of the Bill, that produces this response. Put another way, the informal channel within Parliament, which means that constitutional issues are subject to a distinct standard of justificatory analysis, is the product of the substance of the content of the questions and arguments put to Government. For example, as a result of the combined scrutiny of the Public Bodies Bill by Constitution Committee, the DPRRC and Peers, future

⁹⁸ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL); for analysis see: A Kavanagh, 'Pepper v Hart and Matters of Constitutional Principle' (2005) 120 Law Quarterly Review 98.

⁹⁹ See 3.2.

¹⁰⁰ R Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive' [2004] Public Law 495, 500.

Governments will have a clear guide to the boundaries of constitutionality that regulate the use of Henry VIII powers. If the Government knows its proposals will be subject to vigorous analysis that applies constitutional norms to its legislation, then this might have a positive effect on the way that Governments approach designing and justifying the constitutional effect of primary legislation.

Within Parliament, the Government is in control of the legislative process, but this does not mean that the Government wants to enact Bills with constitutional effect without challenge. In a parliamentary system, it is Parliament's responsibility to subject legislative proposals to critical examination. When the Bill in question has constitutional implications, if parliamentarians can use constitutional interpretation to support their analysis of the Bill, this can have the major benefit of testing the Government's justification for changing the constitution in a public forum. If the end result is that the Government responds in good faith, by changing its position or by developing its own case for the proposal, then the practice has facilitated a dialogue that allows the ordinary legislative process to reflect the distinctive needs of the constitutional effect of a Bill. This dialogue is a form of justificatory accountability that enhances the legitimacy of the parliamentary legislative process.

6.2.3 Justification and constitutionalism

According to Sunstein, a basic function of constitutionalism is to enhance reasoning and therefore contribute to the achievement of one of the ideals of deliberative democracy.¹⁰¹ David Feldman (2001-2004) and Murray Hunt (2004-),

¹⁰¹ C Sunstein, *Designing Democracy: What Constitutions Do* (OUP 2001) 6-7.

the first two legal advisers to the Joint Committee on Human Rights, have taken up this deliberative approach to constitutionalism. They have both argued that justification and reason-giving are central to constitutionalism. This sub-section uses their analysis of constitutionalism to argue that parliamentary constitutional interpretation contributes to the realisation of constitutionalism, conceived of a standard of justificatory accountability, within the legislative process. By enhancing the level of justification for the constitutional effect of a Bill, parliamentarians are able to make the normative content of the constitution relevant to the process of shaping the content of the law – a basic feature of the form of constitutionalism defended by Feldman and Hunt.

Feldman argues that constitutionalism should be conceived of as a process. Constitutionalism demands that the conditions are in place for the public justification of state power, but does not require adherence to a particular set of normative values.¹⁰² Feldman suggests that it is better to see constitutionalism ‘as a commitment to using distinctively constitutional modes of argument’ or a ‘commitment to political-legal justification’.¹⁰³ Feldman captures this point when he argues: ‘Constitutionalism is lived; it is how one behaves if one takes constitutions seriously’.¹⁰⁴ A key feature of Feldman’s conception is that it does not require constitutional argument to form part of the imposition of legal constraints upon the Government or the legislature, and thus fits within the UK parliamentary context:

¹⁰² D Feldman, “‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (2011) 64 *Current Legal Problems* 1, 5.

¹⁰³ D Feldman, “‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (n 102) 9.

¹⁰⁴ D Feldman, “‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (n 102) 8.

The issue of limitation of political power is, in the UK, itself one of the controversial questions of constitutional debate, to be debated as part of the process of constitutionalism rather than being pre-empted by a specific set of values about the limitation of power, stipulated as a large part of the definition of constitutionalism.¹⁰⁵

Feldman's argument is that constitutionalism is a '*sine qua non* for the effective operation of a constitution'.¹⁰⁶ Parliamentary constitutional interpretation fits the profile of an activity that meets the standard of Feldman's constitutionalism. Part of the value of constitutional interpretation is that it is a form of parliamentary reasoning that demonstrates a commitment to political-legal justification. By contributing to the process of justifying the constitutional effect of a Bill, constitutional interpretation demonstrates a commitment to the constitution within the legislative process.

Constitutionalism demands that the norms of the constitution figure as part of political debate. This justificatory form of constitutionalism sets a basic standard that, in the process of enacting law with constitutional effect, those empowered to enact and scrutinise the changes should engage with the relevant existing standards of the constitution, whatever they may be. This corresponds with Waldron's notion of integrity within the legislative process.¹⁰⁷ That parliamentarians demonstrate reflection upon the basic principles of the constitution is valuable to the legislative process beyond its ability to secure

¹⁰⁵ D Feldman, 'Constitutionalism, Deliberative Democracy and Human Rights' in J Morison, K McEvoy and G Anthony (eds) *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (OUP 2007) 449.

¹⁰⁶ Ibid.

¹⁰⁷ J Waldron, 'Legislating with Integrity' (2003-2004) 72 *Fordham Law Review* 373

certain substantive outcomes. It is valuable because it shows that parliamentarians take the normative structure of the democratic law-making process seriously.

Hunt argues that the constitutional-norm based scrutiny of the JCHR and the Constitution Committee conforms to an understanding of constitutionalism that privileges a culture of justification.¹⁰⁸ Hunt's conception of constitutionalism sees the culture of justification as the standard supplied by constitutionalism. Hunt's argument is that the work of the JCHR shows that the fact of parliamentary sovereignty is not necessarily a barrier to the presence of constitutionalism, in the form of a culture of justification, within the legislation process. Indeed the Constitution Committee illustrated this point when it used parliamentary sovereignty as the basis for demanding Government justification of the use of Henry VIII powers that would transfer legislative power away from Parliament in the debate on the Public Bodies Bill.¹⁰⁹ However, for Hunt's form of constitutionalism to flourish participants in the process must abandon any reliance on parliamentary sovereignty as a reason to avoid justification based on constitutional norms. For Hunt constitutionalism does not necessarily require effective legal limits, instead it relies upon the idea that 'exercises of power that infringe human rights require public justification by reference to reasons, that is

¹⁰⁸ M Hunt, 'Reshaping constitutionalism' in Morison, K McEvoy and G Anthony (eds) *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (Oxford, OUP 2007) 477; M Hunt, 'The Joint Committee on Human Rights' in A Horne, D Oliver and G Drewry (eds) *Parliament and the Law*.

¹⁰⁹ See 3.2.1.

rational explanations for why a decision has been taken'.¹¹⁰ The same point applies to constitutional norms other than rights. To see constitutionalism as requiring justification for decisions affecting constitutional rules, rather than necessarily the enforcement of constitutionally formalised limits, shows that the justification supplied by parliamentary constitutional interpretation is central to the relevance of constitutionalism within the legislative process.

According to both Hunt and Feldman, constitutionalism requires that constitutional norms be used as part of the process of justifying the constitutional content of legislation in the legislative process. This conception of constitutionalism reinforces the idea that constitutional interpretation should not be judged only on the impact it has upon the content of legislation, but whether it prompts those responsible for the Bill to develop their justification for that content. Hunt and Feldman's conception provides further understanding of what makes constitutional interpretation valuable. However, the main criticism to be made of this conception of constitutionalism is that it is rather thin. Murkens offers a powerful critique of the idea that constitutionalism can be reduced to a process of justification.¹¹¹ Murkens argues that constitutionalism should not refer to a context where the constitution is 'nothing other than a reflexive process, especially to a process that can be altered by each new generation'.¹¹² Murkens denies that a process of self-limitation, if it takes the form of political justification, should be understood as an example of constitutionalism. Murkens explains that

¹¹⁰ M Hunt, 'Reshaping constitutionalism' in Morison, K McEvoy and G Anthony (eds) *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (Oxford, OUP 2007) 470.

¹¹¹ J Murkens, 'Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 *Oxford Journal of Legal Studies* 427.

¹¹² Murkens (n 111) 451.

constitutionalism requires ‘effective restraints upon government action’.¹¹³ Using constitutional norms as part of the debate on the constitutional effect of a bill should not be considered an example of constitutionalism:

Linking constitutionalism with quasi-normative notions of governmental practice (such as auto-limitation) holds the integrity of the entire legal order hostage to political morality (as opposed to constitutional legality). The entire scope of constitutionalism, from the constitutionality of laws to restraints on governmental action, is made contingent upon the heteronomous quality of law (law must be accepted by the members of a community) and upon parliamentary abstinence from its alteration... Where constitutional limits ultimately depend on the good will of public officials, and cannot of themselves and in a way that is internal to the polity guarantee that their requirements are met, constitutionalism is a fiction.¹¹⁴

Murkens’ argument implies that constitutionalism is not relevant to a constitutional system where the norms of the constitution can be changed by the ordinary political process and the sanctity of the norms of the constitution are not ‘guaranteed’ by the system itself. The danger of Feldman and Hunt’s approach, as highlighted by Murkens’ argument, is that to regard constitutionalism as a process might deprive the concept of any original meaning. The strength of Murkens’ analysis is that it shows that the concept of constitutionalism as a procedural ideal needs to be placed on thicker normative foundations.¹¹⁵ It certainly cannot rest on

¹¹³ Murkens (n 111) 449.

¹¹⁴ Ibid.

¹¹⁵ F Michelman, ‘Constitutionalism as Proceduralism: A Glance at the Terrain’ in S Tierney and E Christodoulidis (eds), *Public Law and Politics* (Ashgate 2008)

certain conceptions of liberal constitutionalism, and the next chapter seeks to locate them within political constitutionalism.

6.3 Negotiating the constitution within Parliament

The second element of the value of parliamentary constitutional interpretation is that it enables parliamentarians to negotiate the meaning of the constitution within Parliament. There are two connected dimensions to this form of negotiation. The first is that the practice exposes the meaning of the norms of the constitution. By interpreting and applying the constitution to legislative proposals, the practice is able to thicken understanding of how the constitution works and what the relevant norms mean in practice. The second dimension is that the practice is used to shape constitutional norms that are applicable in the legislative process. Both of these dimensions highlight the negotiability of the UK constitution.¹¹⁶ Many of the norms of the constitution require what Webber calls ‘specification’, and this, within the parliamentary legislative process, can be achieved through constitutional interpretation.¹¹⁷

6.3.1 Exposing the normative content of the constitution

The first dimension is that the practice serves to expose the hidden normative ‘wiring’ of the UK constitution.¹¹⁸ Within the United Kingdom’s political system, Parliament and the legislative process are at the frontline of constitutional debate. It is Parliament that considers and formally decides many of the major

156; Y Allard-Tremblay, ‘Proceduralism, Judicial Review and the Refusal of Royal Assent (2013) 33 Oxford Journal of Legal Studies 379.

¹¹⁶ G Webber, *The Negotiable Constitution* (CUP 2009).

¹¹⁷ Webber (n 116) 113.

¹¹⁸ P Hennessy, ‘The Hidden Wiring: Unearthing The British Constitution’ (Gollancz 1995).

constitutional questions of the day. As the case studies demonstrated, Parliament has to consider questions such as: whether fixed-term Parliaments should be adopted, whether significant legislative powers should be granted to Government Ministers to decide the fate of public bodies, and whether a statutory provision that defines ministerial accountability for the NHS should be changed. These questions are not decided by the constitutional interpretation of individual parliamentarians, but the practice does contribute to how these norms are understood, which in turn can increase their effectiveness.

If the constitution is best conceived of as an activity, then it is only when we see it in action rather than in the abstract that we really understand how it works. As Perry explains, the meaning of a norm is determined by how it is applied in practice.¹¹⁹ The case studies show that when parliamentarians use the legislative process to explore the constitutional implications of a Bill, the resulting negotiations can be significant. The current meaning of the norms of the British constitution are not found from studying the principles in the abstract, but comes from analysing how they shape real political decisions. Parliamentary constitutional interpretation is a form of reasoning that allows parliamentarians to reveal their own understanding of what the norms of the constitution mean in practice. In the legislative context, what parliamentarians - and in particular those who form part of the Government - think and say it means, is crucial to determining the nature and output of the law-making process. That the norms of the constitution are subject to disagreement between parliamentarians inside and

¹¹⁹ M Perry, 'The Legitimacy of Particular Conceptions of Constitutional Interpretation' (1991) 669 *Virginia Law Review* 77, 119.

outside Parliament is also a sign of their continued relevance to political decision-making and accountability.¹²⁰

The numbers of citizens who read *Hansard* may be small, but it is important to remember that many constitutional norms are supposed to apply to the Government and to parliamentarians. To return to Voermans' point again, the way in which norms, including legislative provisions, are applied and understood is not just a question of the clarity of the norm itself, but also how they are communicated.¹²¹ Constitutional norms stand a better chance of influencing the behaviour of parliamentarians and the Government if they are clearly articulated within the legislative process. As Davis' important analysis of the passage of the Legislative and Regulatory Reform Bill shows, the legislative process within Parliament presents an opportunity for the defence of the very values that underpin the legislative process.¹²² The analysis of clauses that challenge the principles which underpin the rules and procedures of the legislative process within the process itself represents a precious opportunity for parliamentarians to expose to the Government, to fellow parliamentarians and to citizens the practical and legal implications of the 'internal normative order' of the parliamentary law-making process.¹²³ It is the Government's responsibility to outline the case for how the law should be changed, but it is Parliament's responsibility to highlight to the Government the implications of changing the norms that constitute the procedures within the institution from which they derive their own power. Within

¹²⁰ Gee and Webber (n 54) 306-312.

¹²¹ Voermans (n 97) 49.

¹²² P Davis, 'The Significance of Parliamentary Procedures in Control of the Executive: a Case Study: the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006' [2007] Public Law 67.

¹²³ MacCormick (n 86) 55-56.

a parliamentary system, it is vital that parliamentarians demonstrate their loyalty to Parliament by defending its procedures; without such institutional loyalty, the integrity of the system is at risk.¹²⁴

Parliamentary constitutional interpretation can serve to improve the transparency and accessibility of a constitutionally significant provision, if it either prompts the Government to explain its purpose or if the Government uses it itself, unprompted, to explain the purpose of the provision.¹²⁵ A significant finding of the case studies is that the interpretability of a particular constitutionally significant provision does not just depend on the clarity of its drafting, but is also influenced by the debate that preceded its enactment. The debate on the Fixed-term Parliaments Bill showed that parliamentary debate is an important source for the constitutional interpretation of subsequent Parliaments.¹²⁶ If an important statutory provision is not subject to debate, then it is likely to weaken Parliament's ability to analyse the provision when it subsequently comes to debating whether it should be amended or repealed, or when it is relevant to debate it for any other reason. Parliamentarians use constitutional interpretation to harness the input of their forebears and to put the logic of previous majorities to the existing Government.¹²⁷ Testing how the reasoning behind existing legislation fits with or departs from a legislative proposal is an effective approach to scrutiny. In the absence of judicial interpretation, articulating the reasoning behind an enacted

¹²⁴ J Waldron, 'Legislating with Integrity' (2003-2004) 72 Fordham Law Review 373.

¹²⁵ D Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (n 5) 333.

¹²⁶ See 5.2.2.

¹²⁷ M Goldoni, 'Political constitutionalism and the value of constitution making' (2014) 27 Ratio Juris 387, 397.

provision can help to expose the reasoning, or lack of it, behind the clauses of a Bill.

The case studies have shown that parliamentary constitutional interpretation can produce a distinctive form of analysis that helps explain the significance of the constitutional effect of clauses within a Bill. By applying an external normative standard to a clause, and by contrasting a proposed clause with the norms that it would replace, the debate is able to highlight important features of the proposed Bill that might otherwise go unnoticed. The value of this process, in terms of raising the level of justification, has already been noted, but it is worth adding that this is often also the point that appears to instigate a Government amendment. So when Lord Woolf explains that an aspect of a Bill contravenes both the principle of the rule of law and the Constitutional Reform Act 2005, the Government is more likely to listen.¹²⁸ When there is clear contravention of a constitutional principle, then exposing the implications of the principle within debate can serve to prompt Government action.

The debate on the Health and Social Care Bill demonstrated another aspect of exploring the meaning of constitutional norms during debate. The constitutional norms that were subject to interpretation, and the questions to which they gave rise, let alone the answers, were far from clear. This was in part because the nature of the norms involved was unclear and uncertain. The Constitution Committee was able to mitigate the problems of the uncertainty of the relationship between the relevant clauses within the Health and Social Care Bill and the convention of

¹²⁸ See 3.2.2.

individual ministerial responsibility by exploring the relationship between them in their two reports on the Bill.¹²⁹ The reports do not offer a definitive account of the implications of the relationship; if anything, they simply highlight the uncertainty and subjectivity of the constitutional question within that particular debate. The absence of a definitive ruling as a product of their interpretative analysis should be seen as a strength of their approach. The report served to expose a weakness both in the provisions Bill and in the constitutional norms that were relevant to the Bill, and the exposure of this weakness played a key role in the subsequent parliamentary debate on how to clarify the role of constitutional norms within the Bill. This example shows that parliamentary constitutional interpretation can highlight weaknesses of certain constitutional norms, and this exposure may also prove to be a catalyst for action.

6.3.2 Contributing to the normative content of the constitution

The second dimension of parliamentary constitutional interpretation's contribution to the negotiation of the constitution is that it enables Parliament to contribute to the normative content of the constitution. The practice is used to do this in a number of different ways: to specify standards, to identify principles, to set precedents and to prompt amendments. Some of the most important norms of the UK constitution are abstract principles that cannot be directly applied to the content of a legislative proposal,¹³⁰ but are what Sunstein labels 'abstractions'.¹³¹ The basic goal of most parliamentary constitutional interpretation is to explain the constitutional effect of a Bill, and this will often involve applying such

¹²⁹ See 4.2.1 and 4.2.5.

¹³⁰ J McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32 *Legal Studies* 577.

¹³¹ C Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996) 172.

‘abstractions’ to the text of a Bill. To apply an abstraction, a parliamentarian will in many cases have to specify its meaning through interpretation. On the other side of the spectrum, parliamentarians may also have to identify the principles behind specific constitutional rules in order to develop the standards that can be applied to legislation. The specification of constitutional principles extends beyond the rights context analysed by Webber, and is an important part of the practice examined in the case studies.¹³² The Constitution Committee is particularly well placed to use constitutional interpretation to develop normative standards that can then be applied to particular clauses within Bills. The Committee and individual parliamentarians sometimes work together, or separately, to develop specific tests and sub-rules to the text of the Bill, to apply a precedent or to argue for an amendment that is designed to protect a particular constitutional norm. Before examining each of these examples, it is important to note how the parliamentary context affects how the practice contributes to rule making.

Parliament has special responsibility for the interpretation and specification of the constitutional principles that regulate the democratic law-making process. Parliament is the only body that can develop standards that relate to the appropriate parliamentary procedure for Henry VIII powers. As Devins and Fisher have pointed out, in the United States constitutional interpretation within the legislative process is likely to apply constitutional norms that are not applied by

¹³² W Waluchow, ‘Constitutional Rights and Democracy: a reply to Professor Bellamy’ (2013) 14 *German Law Journal* 1039, 1043; M Goldoni, ‘Political constitutionalism and the value of constitution making’ (2014) 27 *Ratio Juris* 387, 400.

courts.¹³³ Parliamentarians use constitutional interpretation to develop principles that serve to protect and enhance their role within the constitution.¹³⁴ The specification and interpretation of constitutional norms extends beyond rule of law and rights concerns, and involve protecting values that are central to the political character of the constitution.¹³⁵ Parliament engages in a range of constitutional norms, and its use of norms that underpin the democratic law-making process is particularly valuable to Parliament's integrity.¹³⁶ Further, when parliamentarians make use of these constitutional tools to specify sub-norms that can be applied in the legislative process, this may have a 'legitimizing effect'.¹³⁷ The fact that Parliamentarians are themselves taking ownership of the norms of the constitution may indirectly improve the legitimacy of certain aspects of the constitution. Finally, by developing *non-binding* standards, parliamentary constitutional interpretation emphasises that the normative content of the constitution is flexible and is constantly being renegotiated.

In terms of developing the meaning of the constitution, the Constitution Committee is in a special position within Parliament. Unlike individual peers or MPs, as was noted above, the Committee has a body of work, and some of these

¹³³ N Devins and L Fischer, *The Democratic Constitution* (Sweet & Maxwell 2004) 229.

¹³⁴ M Goldoni, 'Political constitutionalism and the value of constitution making' (2014) 27 *Ratio Juris* 387,402.

¹³⁵ Goldoni (n 134) 397-400.

¹³⁶ J Waldron, 'Legislating with Integrity' (2003-2004) 72 *Fordham Law Review* 373.

¹³⁷ M Hunt, 'The Joint Committee on Human Rights' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* 247.

reports contain standards which the Committee use in its Bill scrutiny.¹³⁸ While the Committee is not under any obligation to follow the examples of its predecessors, its previous reports contain precious examples of standards and positions that can be used to justify its arguments. Kahana argues that this form of reflection is an important part of constitutional interpretation within the legislative process:

If legislatures are to interpret the constitution, consistency requires them to institutionalize reflection on past legislative interpretations. Consistency is of course not the only value that legislators should consider in their interpretive process, but if they choose to adopt an interpretation of the constitution that is inconsistent with past interpretation, they should be aware of it and have good reasons for doing so.¹³⁹

The Constitution Committee does ‘institutional reflection’ in this sense, and it is an important part of what makes the committee’s constitutional interpretation so valuable. The Committee’s institutional memory has advanced Parliament’s ability to develop the meaning of constitutional norms through its legislative scrutiny. The key active ingredient in the development of those norms is constitutional interpretation. Using a proactive approach to constitutional interpretation, whereby the Committee goes beyond technical reasoning, to explain how principles are specified in their analysis of particular Bill has beneficial long-term consequences. The Committee can then draw upon previous

¹³⁸ J Simson Caird, R Hazell and D Oliver, ‘The Constitutional Standards of the House of Lords Select Committee on the Constitution’ (The Constitution Unit UCL 2014).

¹³⁹ T Kahana, ‘Legalism, Anxiety and Legislative Constitutionalism’ (2005-2006) 31 *Queen’s Law Journal* 536, 569.

reports in order to develop their analysis of the constitutional effect of a particular Bill.

In the debate on the Public Bodies Bill, the Constitution Committee demonstrated how it develops standards and set precedents.¹⁴⁰ In its report on the Bill, the Constitution Committee used a test for the appropriateness of Henry VIII clauses that they had originally articulated in an earlier report on the Legislative and Regulatory Reform Bill. The test is derived from the basic principle that only Parliament should be able to amend or repeal primary legislation. The test is a clear example of the process of specification that is central to parliamentary constitutional interpretation. It enables parliamentarians to translate broad principles into a form that may then be applied to the terms of a Bill within the legislative process. By applying these principles in this way, parliamentarians serve to remind the Government and others that these principles are relevant to the task of policy making.

The debate on the Public Bodies Bill also showed how parliamentarians use existing Acts of Parliament as legislative precedents that serve to inform their scrutiny.¹⁴¹ During that debate, the DPRRC, the Constitution Committee and individual Peers all used the provisions within the Legislative and Regulatory Reform Act 2006 as a legislative precedent to compare and contrast with those in the Public Bodies Bill. The reason that many parliamentarians regarded the provisions within the 2006 Act as a precedent is partly because many of the

¹⁴⁰ See 3.2.1.

¹⁴¹ See 3.2.

provisions were themselves the result of negotiations within the Lords.¹⁴² In the debate on the 2006 Bill, peers had established basic principles for how Henry VIII powers should be limited, and this made a major impact on the debate on the Public Bodies Bill.

The use of the provisions in the Legislative and Regulatory Reform Act 2006 as tools for legislative scrutiny also serves the third and final way that parliamentary constitutional interpretation develops the meaning of the constitution – by prompting the introduction of a ‘constitutional protection clause’ into a Bill.¹⁴³ In each of the case studies, the negotiations prompted by parliamentarians’ constitutional interpretation resulted in amendments to each Bill that sought to limit any potential damage to a constitutional principle. In the Public Bodies Bill numerous clauses were added to limit the potential for the Henry VIII powers to be used in such a way that usurps Parliament’s role in relation to primary legislation. During that debate constitutional protection clauses like the sunset clause were added, which meant that the substance of Bill contained provision that were designed to enhance the values that underpin the parliamentary process. By embedding constitutional norms that enhance parliamentary involvement in the legislative process, Parliament is able to protect and even extend its existing role.¹⁴⁴ In the Health and Social Care Bill, a clause was added to the Bill to clarify that the Secretary of State for Health remains politically responsible for the

¹⁴² See A Le Sueur and J Simson Caird, ‘The House of Lords Select Committee on the Constitution’ in A Horne, G Drewry and D Oliver (eds), *Parliament and the Law* (Hart 2013).

¹⁴³ A ‘constitutional protection clause’ is a clause in a Bill which is drafted with the purpose of protecting a constitutional principle, see 3.2.2.

¹⁴⁴ Goldoni (n 134) 402.

NHS.¹⁴⁵ And finally, the Fixed-term Parliaments Bill saw a clause inserted which will require the Act to be reviewed in 2020, which will provide an opportunity for problems with the legislation to be raised and debated.¹⁴⁶ These clauses are valuable for the Bills themselves in that they serve to ensure that constitutional principles are reflected in primary legislation, but they are also important because they can be used, like standards and precedents, to inform subsequent legislative scrutiny. A good example of this use of constitutional protection clauses came during the debate on the Public Bodies Bill, when Lord Woolf used the judicial independence clause in the CRA to argue that the Public Bodies bill was incompatible with the Constitutional Reform Act 2005.¹⁴⁷ There was another, albeit unsuccessful, example of a constitutional protection clause being used as a tool of constitutional interpretation in the debate on the Fixed-term Parliament Bill. Jacob-Rees Mogg MP argued that s2(1) of the Parliament Acts 1911 and 1949, also added as a result of debate in the Lords, should be extended to protect the terms of Fixed-Term Parliament Bill.¹⁴⁸ Even outside the Constitution Committee, when parliamentarians engage in constitutional interpretation they look to the standards of their predecessors. This challenges characterisations of parliamentary supremacy that imply that Parliament legislates into a normative vacuum. When Parliament is considering the constitutional effect of legislation, the judgment of previous Parliaments is anything but irrelevant.

¹⁴⁵ See 4.2.6.

¹⁴⁶ See 5.2.1.

¹⁴⁷ See 3.2.1.

¹⁴⁸ See 5.2.1.

Conclusion

Both elements of the value of parliamentary constitutional interpretation serve to enhance the level of justificatory accountability within the parliamentary process of enacting legislation with constitutional effect. The first element of the practice adds a deliberative hurdle to the process that can produce analysis that can inform subsequent constitutional interpretation. The second element provides a distinctive parliamentary contribution to the content of the constitution that feeds parliamentary scrutiny of the Government's justification for its legislative proposals. These two elements are entwined.

In the abstract it is important not to lose sight of the fact that the nature of the contribution of the practice to the nature of the legislative process depends upon the approach of the Government. In contrast to a formal process of constitutional amendment, the practice is not supported by counter-majoritarian constitutional constraints that provide a firm platform for the consideration of constitutional questions within the legislative process. A constructive attitude from the Government to challenges on the constitutional effect of a Bill is central to the practice reaching its potential. At the same time, a constructive attitude would not necessarily produce the level of negotiation and justification necessary for a distinctive parliamentary contribution to the norms of the constitution, if parliamentarians do not use the different tools at their disposal - reports, speeches and amendments to present arguments - based on constitutional interpretation during the debate. In this sense, the adversarial nature of parliamentary constitutional interpretation can be both a strength and a weakness. As Feldman notes, in the UK parliamentary context consensus may weaken the process, as

without the disagreement the Government is not prompted to develop its case for its proposals.¹⁴⁹ Disagreement is a major part of how parliamentary constitutional interpretation contributes to justification. The Fixed-term Parliaments Bill shows how even in the face of serious disagreement the Government can stifle the contribution of debate. The speed of the debate and the Government's limited attempt to develop a sophisticated analysis of some aspects of the Bill meant that the potential contribution of the practice was not realised.

The interpretation of constitutional norms during the legislative process supplies a form of disagreement that expands the basis of disagreement during legislative negotiations in Parliament. There will always be many possible reasons for justifying or criticising a Bill. The UK's constitutional framework does not provide a formal hierarchy or legal method for distinguishing those reasons; nonetheless, the parliamentary legislative process operates within a constitutional framework, and by using it to analyse a legislative proposal parliamentarians are able to expand the scope of political debate. This is particularly important in relation to specific clauses of a Bill, as policy analysis is not necessarily suited to analysing the merits of a particular clause. Approaching a particular clause through the prism of a constitutional norm can link detail to some of the most fundamental norms in the UK's constitutional system. These norms do not necessarily trump other reasons, but they may add depth to the nature of the debate, make the Government's intentions more transparent, and therefore increase Parliament's ability to hold the Government to account for its legislation. Constitutional

¹⁴⁹ Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (n 5) 328.

interpretation fits a positive, rather than negative, account of constitutionalism.¹⁵⁰

The practice does not stop Government from legislating contrary to constitutional norms. Instead the practice serves to create informal channels for constitutional change within the majoritarian decision making process within Parliament. This form of constitutional practice, which appears to be based on a political form of constitutionalism, and does not create secure limits on the scope of Government legislation, does nonetheless have consequences for the substance of the constitution. By making the case for clauses that secure the relevance of Parliament within the constitution, such as sunset clauses, and by thickening parliamentary conceptions of the rule of law and other constitutional principles, the practice serves to allow parliamentarians to make a distinctively parliamentary contribution to the constitution. That appears to be precisely what Tushnet had in mind when he refers to the benefits of combining constitutionalism and the democratic law-making process.¹⁵¹ The combination is about more than the presence of the interpretation of constitutional norms within a democratically accountable institution, it also enables the substance of the principles of the constitution to play a positive role in determining the content of the law.

¹⁵⁰ S Holmes, *Passions and Constraints* (Chicago University Press 1997) 1-10.

¹⁵¹ M Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in R Bauman T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 355.

7. Parliamentary Constitutional Interpretation and Political Constitutionalism

Political constitutionalism directly engages with and defends the role of the parliamentary legislative process within the UK constitution.¹ This makes the model central to understanding the role of parliamentary constitutional interpretation within the UK constitution. Unlike the account of constitutionalism provided by Feldman and Hunt,² the political model advocates the constitutional features that are central to the character of parliamentary constitutional interpretation in the UK: parliamentary supremacy and the absence of entrenched constitutional law. Political constitutionalism argues in favour of a ‘flat’ constitution, and rejects the idea that the UK should adopt a ‘hierarchical’ constitution, which would mean that constitutional laws have higher legal status.³ Despite the relevance of political constitutionalism to the constitutional context in which parliamentary constitutional interpretation operates, the practice poses some difficult questions of existing approaches to political constitutionalism that this chapter seeks to explore. By relating parliamentary constitutional interpretation to political constitutionalism, this chapter seeks to broaden and to develop the analysis of the role of the practice within the legislative process and the United Kingdom’s

¹ M Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (2013) *German Law Journal* 14 (8) 1053, 1054-1055.

² See 6.2.3.

³ M Elliott, ‘The Constitutional Role of the Judiciary if There Were a Codified Constitution’ (University of Cambridge Legal Studies Research Paper Series Paper No. 51/2013) 2.

constitution, and at the same time, make a contribution to debates on the nature of political constitutionalism.

This thesis argues that constitutional interpretation is instrumental for parliamentarians and parliamentary committees in the legislative process, as it can be used both to raise the level of justification during the legislative process and to facilitate a distinctive parliamentary contribution to the constitution. The substance of the normative content of the constitution should be used to both strengthen the legislative process, and to guide primary law-making and constitutional change. The core of the argument in this chapter is that the values of the practice strengthen political constitutionalism by making it a more realistic and balanced model, which explains how Bills with constitutional effect should be engaged with in Parliament. As a result, the model is made more relevant to contemporary debates in the UK on parliamentary and constitutional reform.

Political constitutionalists have sought to defend the value of the legislative process in the face of the criticisms of liberal and legal constitutionalists, and yet at the same time, they have not fully developed an account of how legislative politics should work within the framework of a political constitution. Kavanagh has observed that despite seeking to defend the legitimacy of political institutions, political constitutionalism has offered little in the way of clear and practical prescriptions for how real political

processes can be improved.⁴ Goldoni has also argued that political constitutionalists have yet to set out in much detail how politics, and in particular constitutional politics, should work in the political constitution.⁵ Gardbaum argues that political constitutionalism ‘provides no adequate forum for critically scrutinising the justification for a piece of legislation to determine if it meets the minimum standard of plausibility in terms of public reasons’.⁶ While political constitutionalism has addressed the issue of the role of rights within Parliament,⁷ there has been little in way of direct engagement with the situation which the case studies cover: how should the legislative process within a political constitution respond to proposals that seek to modify the existing constitutional structure, the very structure that underpins the political nature of the constitution.

At this point it is important to acknowledge the breadth of the literature on constitutionalism, and the narrow scope of this chapter. Taken at its most basic level constitutionalism refers to the idea that government can and should be legally limited in its powers, and that its authority or legitimacy depends on observing these limitations.⁸ But it can also be conceived more broadly, Lord Steyn defines it in the following terms: ‘the exercise of

⁴ A Kavanagh, ‘Constitutional review, the courts and democratic skepticism’ (2009) 62 *Current Legal Problems* 102 133.

⁵ M Goldoni, ‘Two internal critiques of political constitutionalism’ (2012) 10 *International Journal of Constitutional Law* 926; M Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (2013) *German Law Journal* 14 (8) 1053; M Goldoni, ‘Political constitutionalism and the value of constitution making’ (2014) 27 *Ratio Juris* 387.

⁶ S Gardbaum, *Commonwealth Constitutionalism* (CUP 2013) 55.

⁷ R Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86.

⁸ W Waluchow, ‘Constitutionalism’, *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/constitutionalism>> accessed 14 May 2014.

government power must be controlled in order that it should not be destructive of the very values it was intended to promote'.⁹ However, even by the standards of constitutional law and constitutional theory, the meaning of constitutionalism is fiercely contested. It is difficult to exaggerate the scale of the literature on constitutionalism, and there are many important angles on constitutionalism that are not covered here.¹⁰ For example, within a vast literature in the United States there is an ever-expanding number of explanations of the relationship between constitutionalism and democracy.¹¹ By contrast, in the United Kingdom context, Murkens asserts that the idea is both under-researched and under-theorised.¹² Despite this, it is frequently used in the literature on the United Kingdom constitution, particularly in order to debate the competing claims of the legal and political models of the concept.¹³

Political constitutionalism is used in different ways in this debate. In one sense, political constitutionalism is a stand-alone constitutional model that has been developed to challenge theories of legal and liberal constitutionalism. But political constitutionalism is also used to analyse the reality of constitutional practices. There is a welcome trend in this literature

⁹ Lord Steyn, 'The weakest and least dangerous department of government' [1997] Public Law 84, 87-88.

¹⁰ See C Schwöbel, *Global constitutionalism in International Legal Perspective* (Martina Nijhoff 2011); M Loughlin and N Walker (eds), *The Paradox of Constitutionalism* (OUP 2008); P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010).

¹¹ N Sultany, 'The state of progressive constitutional theory' 47 Harvard Civil Rights-Civil Liberties Law Review (2012) 371.

¹² J Murkens, 'Quest for Constitutionalism in UK Public Law Discourse' Oxford Journal of Legal Studies 29 3 (2009) 427.

¹³ For a classic example see: A Tomkins, *Our Republican Constitution* (Hart 2005).

to move away from the idea of binary all-encompassing choices, in terms of definitively categorising constitutions, and elements of constitutions, as either political and legal, and towards a focus on developing the ability on these models to explain constitutional practices.¹⁴ In this sense, the model of political constitutionalism represents a particular perspective or angle for understanding and analysing the constitution.¹⁵ This chapter seeks to build on this shift, and to add to the understanding of political constitutionalism and its relevance to the modern legislative process.

This chapter is divided into four sections. The first section sets out the institutional core of political constitutionalism and the basis of the connection with parliamentary constitutional interpretation. The second addresses the idea that the increasing role of constitutional norms within Parliament represents a shift away from political constitutionalism. The third analyses three weaknesses in the connection between political constitutionalism and parliamentary constitutional interpretation. The fourth argues that the case for parliamentary constitutional interpretation can be used by political constitutionalism to provide an account of how constitutional politics should work within a political constitution.

¹⁴ G Gee and G Webber, 'What is a political constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273, 298; A Horne and C Walker, 'Lessons learned from political constitutionalism? Comparing the enactment of control orders and terrorism prevention and investigation measures by the UK Parliament' [2014] *Public Law* 267; P Scott, '(Political) Constitutions and (Political) Constitutionalism' (2013) 14 *German Law Journal* 2157, 2178-2179.

¹⁵ Scott (n 14) 2179; Gee and Webber (n 14) 298.

7.1 The institutional core of political constitutionalism

If the institutional core of legal constitutionalism is judicially enforced constitutional limits, the equivalent in the political constitution would be the legislative process within an elected parliament free from legally entrenched constitutional constraints, whereby all existing law could be amended, and no law was considered formally fundamental. A political constitution is the product of ordinary politics and is also subject to change by the ordinary legislative process. It is not solely the product of a constitutional moment, because a political constitution is constantly being moulded by the political circumstances of the day. One of the benefits of leaving the constitution open to renegotiation through legislative action is that it presents Parliament with the opportunity to develop its own account of what the constitution means, and this fact is at the heart of the connection between parliamentary constitutional interpretation and political constitutionalism.

Political constitutionalism is wedded to a procedural understanding of a constitution.¹⁶ A constitution should be seen as a tool for securing legitimate and democratic conditions for law making, and not for securing particular outcomes of the legislative process. This understanding can be related to a range of important works on constitutional law and constitutionalism. Campbell's ethical positivism,¹⁷ Ely's limited role for judicial review,¹⁸ and

¹⁶ For a critique of this approach see: F Michelman, 'Constitutionalism as Proceduralism: A Glance at the Terrain' in S Tierney and E Christodoulidis (eds), *Public Law and Politics* (Ashgate 2008) 156.

¹⁷ T Campbell, *Ethical Positivism* (Aldershot 1996).

¹⁸ J Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

Habermas' focus on the role of deliberation,¹⁹ each emphasises a constitution's capacity to set up legitimating procedures. A constitution does not necessarily involve subordinating immediate policy objectives to certain long-term principles or 'tying the hands' of temporary majorities.²⁰ The distinguishing feature of political constitutionalism is that it argues that a constitution should set up the democratic procedure and allow that procedure to be renegotiated by the political majority of the day, even if that means that fundamental constitutional norms can be changed by the majority of the day. If the point of a constitution is to set up a legitimate procedure, and to facilitate the capacity of the legislature to alter the normative foundations of that procedure, then parliamentary supremacy is a desirable feature of a constitution and parliamentarians should be entrusted with the ability to negotiate how that procedure should be changed.²¹ As Gyorfi points out, on this view, the legislature's interpretation of the constitution should be privileged and valued over that of judges.²² This position has direct consequences for how judges should interpret the constitution according to political constitutionalism, but this chapter asks how should this position affect the way in which parliamentarians act within the legislative process?

¹⁹ J Habermas, *Between Facts and Norms: contributions to a discourse theory of Law and democracy* (MIT Press 1998).

²⁰ F Hayek, *The Constitution of Liberty* (Routledge 1960) 180.

²¹ T Gyorfi, 'In Search of a First-Person Plural, Second-Best Theory of Constitutional Interpretation' (2013) 14 German Law Journal 1077, 1095-1106.

²² Ibid.

A priority of political constitutionalism is that constitutional laws should not disable democratic politics or remove questions from the scope of political debate.²³ As a result, political constitutionalism staunchly defends the elements of the UK constitution that are responsible for its susceptibility to change via the ordinary legislative process. This is relevant to understanding the practice of parliamentary constitutional interpretation because these elements are responsible for the conditions that are central to the character and value of the practice. Political constitutionalism's defence of these elements of the United Kingdom's constitution can be traced back to Griffith's famous statement that the constitution is 'no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also'.²⁴ Gee and Webber argue that this statement is an endorsement of the idea that the constitution should remain open to renegotiation via the ordinary political process.²⁵ This prescriptive interpretation is key to the connection between parliamentary constitutional interpretation and political constitutionalism. The practice examined in this thesis is a part of what political constitutionalists regard as so valuable: the renegotiation of the constitution within the ordinary political process. As parliamentary constitutional interpretation enables parliamentarians to participate in this renegotiation, the practice represents a form of constitutional politics that fits with the central ideas of political constitutionalism.

²³ J Waldron, *Law and Disagreement* (OUP 1999) 266.

²⁴ JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 19.

²⁵ Gee and Webber (n 14) 280-281.

Bellamy argues that it is of paramount importance, for political equality and for non-domination, that the constitution remains subject to the ordinary legislative process.²⁶ For Bellamy the ‘democratic process is the constitution’.²⁷ Bellamy explains his vision of the political constitution in the following way:

The very fact that disagreements about process will be on going argues against constitutionalising these procedures. Rather, they must be left open so we may rebuild the ship at sea – employing, as we must, the prevailing procedures to renew and reform those self-same procedures.²⁸

For Bellamy, the political constitution means that the existing norms of the constitution must not be protected from change. This is an argument against entrenched constitutional laws. Bellamy argues that ‘if the people themselves are to be the final arbiters of the constitution, therefore, ordinary legislation within the legislature has to be the sphere of constitutional politics’.²⁹ Bellamy recognises that constitutional norms are valuable, in particular he argues that those rules that constitute the political process should be recognised as constraints upon arbitrary rule.³⁰ Bellamy defends the ability of the legislature to ‘embody constitutional values and to supply mechanisms likely to preserve them’.³¹

²⁶ R Bellamy, *Political Constitutionalism* (CUP 2007) 174-175.

²⁷ Bellamy (n 26) 5.

²⁸ Bellamy (n 26) 174.

²⁹ Bellamy (n 26) 136.

³⁰ Bellamy (n 26) 6.

³¹ Bellamy (n 26) 259.

Waldron also argues that the legislative process should not be precluded from deliberation on key aspects of a constitution.³² Waldron argues that recognition of the value of constitutional norms, including rights and rules that structure democratic procedure, should not mean that legislatures should be prevented from altering these norms.³³ He rejects the idea that constitutional norms should be ‘fixed’ so they cannot be ‘gamed by momentary majorities attempting to lock themselves in power’.³⁴ It is precisely because constitutional rights and principles are so important that they should be subject to debate and disagreement within the democratic forum of the legislature.³⁵ By keeping the constitution within the reach of the legislative process, citizens are able to participate in on-going discussions on how the constitution should be designed and how it should be interpreted. Tushnet summarises the position in the following terms:

Political constitutionalists argue that reasonable disagreements over these (constitutional) matters should be resolved in the same way that disagreements about other policies are – through open debate and ultimate decision by democratically chosen officials.³⁶

All laws should be subject to the same formal legislative procedure so that parliamentarians can debate and disagree on the content of the constitution in the same way that they disagree on the content of primary legislation. Political constitutionalism rejects the idea that legislators are ill suited to

³² Waldron (n 23) 266, 306-312.

³³ Ibid.

³⁴ S Issacharoff, ‘The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections’ (2003) 81 University of Texas Law Review 1985, 1997.

³⁵ Waldron (n 23) 266, 306-312.

³⁶ M Tushnet, ‘The relation between political constitutionalism and weak-form judicial review’ (2013) 14 German Law Journal 2249, 2250.

decide constitutional questions and that the ultimate authoritative interpreter of a constitution should be a court.³⁷ The negotiability of the UK constitution via the legislative process provides parliamentarians with the responsibility for deciding some of the most important constitutional questions, especially those that relate to the norms that structure the constitution and political accountability. Parliamentary constitutional interpretation shows how parliamentarians can respond to that responsibility in a way that enhances the central values of political constitutionalism. Two connections between political constitutionalism and parliamentary constitutional interpretation are particularly important.

The first connection is that the UK constitution presents parliamentarians with the opportunity to shape the content of the constitution *directly*. Advocates of political constitutionalism often cite legislation as the product of the legislature, and defend the ability of that product to achieve the protection of constitutional values.³⁸ The problem with this approach is that in a parliamentary system, legislation with constitutional effect is not necessarily subject to debate or disagreement within the legislative process, which can mean that parliamentarians have little input into the constitutional effect of a Bill. Parliamentary constitutional interpretation can remedy this weakness in two ways. Firstly, the practice enables parliamentarians to engage the Government on the constitutional effect of legislation, which is central to the ability of parliamentarians to contribute to the content of

³⁷ L Alexander and F Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 Harvard Law Review 1359, 1367.

³⁸ Bellamy (n 26) 244.

primary legislation with constitutional effect. As Garret and Vermeule argue, this is important because parliamentarians are well placed to ‘blend policy considerations with technical legal arguments’ in their consideration of constitutional issues.³⁹ Secondly, parliamentarians use the practice to develop constitutional norms, such as standards and precedents, which can shape legislative debate.⁴⁰ The content of such constitutional interpretation benefits from the political standpoint of parliamentarians, who are more likely than the Government to defend the norms that underpin the political processes, which are so cherished by political constitutionalism. A flat constitutional structure, as advocated by political constitutionalism, need not mean that constitutional values are neglected within the legislative process. The effectiveness of political constitutionalism depends upon the actions of parliamentarians. The examples of the practice examined in this thesis show that political actors can use their ability to shape constitutional meaning to make a positive contribution to the parliamentary process.

Political accountability is the second important connection. Tomkins has placed political accountability, and in particular ministerial responsibility and the confidence principle, at the heart of what makes the UK a ‘political constitution’.⁴¹ Parliamentary constitutional interpretation creates a connection between the ability to engage with the substance of the constitution and the ability to hold the Government to account for the

³⁹ E Garrett and A Vermeule, ‘Institutional Design of a Thayerian Congress (2001) 50 Duke Law Journal 1278, 1318.

⁴⁰ See 6.3.

⁴¹ A Tomkins, *Public Law* (Clarendon 2003) 134; A Tomkins, *Our Republican Constitution* (Hart 2005) 1-10, 210.

content of its legislative proposals. That parliamentary constitutional interpretation can potentially increase the level of conflict and disagreement between Parliament and Government is also part of this connection.⁴² By raising the level of justification the practice enlarges the scope of disagreement on the detail of a Bill, and in this sense ensures that the Government faces difficult questions on the constitutional effect of the Bills it introduces to Parliament. One of the strengths of Hunt's and Feldman's conception of constitutionalism is that it recognises that the substance of constitutional norms can be used as political tools that can enhance political accountability. This chapter's argument is that political constitutionalism can and should do the same.

7.2 The role of constitutional norms within the legislative process

The first potential obstacle to the connection between parliamentary constitutional interpretation and political constitutionalism is the idea that the increasing role of constitutional norms within Parliament is part of a shift away from political constitutionalism. The idea that the UK constitution is becoming increasingly legal is one of the most pervading narratives in UK public law. There are several strands to this analysis, including the European Communities Act 1972,⁴³ the development of judicial review,⁴⁴ and the Human Rights Act 1998.⁴⁵ In *Jackson*, Lord Steyn

⁴² G Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28 *Legal Studies* 20, 32; G Webber, 'Parliament and the Management of Conflict' [2014] *Public Law* 101.

⁴³ D Nicol, *EC Membership and the Judicialisation of British Politics* (OUP 2001).

⁴⁴ T Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993).

said the constitution is no longer ‘uncontrolled’, while Lord Hope said that the rule of law is ‘the ultimate controlling principle of the constitution’.⁴⁶ Nicol explains that ‘we have witnessed nothing short of a transformation of the British constitution from a constitution based on politics to a constitution based on law’.⁴⁷ Garbaum also notes that these changes have ‘created the strong impression that the country is moving away from political constitutionalism’.⁴⁸ Much of the attention within this narrative has focused on the changing role of the courts, hence the idea that the constitution has been ‘judicialized’.⁴⁹ For Jowell this change has resulted in a form of constitutionalism that protects ‘the rule of law and at least certain fundamental rights... even from decisions approved by the majority of the electorate’.⁵⁰ Others have noted that these reforms have profoundly changed the ways in which all three branches of the state interact with the norms of the constitution.⁵¹

A number of scholars have drawn connections between the change to the nature of the constitution and the way in which Parliament considers legislation. Rawlings refers to the ‘legalisation of the political process’ in

⁴⁵ A Kavanagh, *Constitutional Review and the Human Rights Act 1998* (CUP 2009).

⁴⁶ *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL) [104] and [107] respectively.

⁴⁷ Nicol (n 43) 1.

⁴⁸ Garbaum (n 6) 23.

⁴⁹ Nicol (n 43) 3.

⁵⁰ J Jowell, ‘Parliamentary sovereignty under the new constitutional hypothesis’ [2006] Public Law 562, 575; see also: S Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution’ (2008) 28 *Oxford Journal of Legal Studies* 28.

⁵¹ V Bogdanor, *The New British Constitution* (Hart 2009).

reference to the debate on the European Communities (Amendment) Bill.⁵² Rawlings notes that legal analysis has long formed part of parliamentary debate, but that the European context meant it loomed ‘uncommonly’ large in the conflict. For Rawlings, this meant that the political constitution – and what he terms ‘a non-legal discourse of public controversy’ was harder to sustain in 1994 than it was 1979.⁵³ In 2005, Rawlings again identified the presence of legal factors, what he terms ‘legal politics’, within the parliamentary debate on the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 as demonstrating a shift away from the political constitution.⁵⁴ Similarly for Nicol, this move away from the political constitution has resulted in a change to the nature of the role of parliamentarians:

Complex legal questions – relating, for example, to the dividing line between areas of Community and national competence – are becoming the staple fare of the diligent legislator. Parliamentarians are increasingly having to take on the role of constitutional lawyers...⁵⁵

The important point for my argument relates to the idea that a growing role of legal or constitutional norms within Parliament is a sign of a shift away from the political constitution. If this is right then political constitutionalism would not be able to explain, or justify, the role of parliamentary

⁵² R Rawlings, ‘Legal politics: the United Kingdom and ratification of the Treaty on European Union: Part 1’ [1994] Public Law 254, 255.

⁵³ R Rawlings, ‘Legal politics: the United Kingdom and ratification of the Treaty on European Union: Part 2’ [1994] Public Law 367, 391.

⁵⁴ R Rawlings, ‘Review, revenge and retreat’ (2005) 68 Modern Law Review 378, 409.

⁵⁵ Nicol (n 43) 260.

constitutional interpretation within the legislative process. Political constitutionalism advocates more, and not less, politics.⁵⁶

Oliver has also made this connection between the role of constitutional principles in Parliament and the shift away from the ‘political’ constitution. Oliver argues that the constitution has, over the past 30 years, become more ‘principled’ and less ‘political’.⁵⁷ As a result of a number of changes to the constitution, ‘principles are articulated and are supposed to govern much political activity’.⁵⁸ Oliver’s argument implies that ‘principle-based scrutiny of legislation’ is part of this transition from politics to principle.⁵⁹ Oliver’s analysis indicates that giving effect to constitutional principles within the legislative process should be considered to be outside of or distinct from ordinary politics.

There are a number of problems with the idea that the presence of constitutional norms as a factor in parliamentary debate on primary legislation should be interpreted as a shift away from the political constitution. The first point to say about the attempt to draw this connection is that it seems oddly ahistorical. Jaconelli’s account of the parliamentary debate on the Parliament Act 1911 shows that constitutional norms have formed an influential part of parliamentary debate on important

⁵⁶ Griffith (n 24) 16.

⁵⁷ D Oliver, ‘The United Kingdom Constitution in Transition: From Where to Where?’ in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: a Liber Amicorum* (OUP 2009) 152-153.

⁵⁸ Oliver, ‘The United Kingdom Constitution in Transition: From Where to Where?’ (n 57) 161.

⁵⁹ Ibid.

legislation in the past.⁶⁰ A second observation is that it seems strange to connect the ‘political’ nature of the constitution to the absence of legal and constitutional considerations within the legislative process. Surely Griffith’s account of the constitution did not depend on the absence of ‘legal politics’? Part of the problem is that, as Gee observes, political constitutionalism has not articulated the positive role that constitutional norms, including constitutional law, should play in a political constitution.⁶¹

Griffith was sceptical of the idea that constitutional values or rights brought benefits to the political process.⁶² He dismissed the idea that certain constitutional norms could provide guidance to legislators: ‘I am very doubtful about the value of telling judges or *legislators* that they should look towards the ideal of justice, truth and beauty in their search for the right solution in difficult cases or problems’.⁶³ As Gee points out, Griffith was concerned that the language of rights would be used to conceal the political character of the issues at stake.⁶⁴ Griffith, according to Oliver, was ambivalent on whether parliamentarians should look to non-binding constitutional norms in general - say the rule of law or parliamentary sovereignty - to guide their answers to legislative problems: ‘it is not clear... to what extent Griffith would accept politicians be constrained in their decision-making by rules that are not enforceable by judges’.⁶⁵ Such

⁶⁰ J Jaconelli, ‘The Parliament Bill 1910-1911: The Mechanics of Constitutional Protection’ (1991) 10 *Parliamentary History* 277.

⁶¹ Gee (n 42) 31.

⁶² Griffith (n 24).

⁶³ Griffith (n 24) 12.

⁶⁴ Gee (n 42) 30-31.

⁶⁵ D Oliver, *Constitutional Reform in the UK* (OUP 2003) 22.

ambivalence might indicate that Griffith would question the notion that parliamentary constitutional interpretation could add value to the political process. Griffith was firmly against the idea that law should be used as a vehicle for making it harder to change the status quo, and therefore it is reasonable to say that constitutional interpretation as a political activity, especially institutionalised within a committee of the House of Lords, would be viewed with suspicion to the extent that it might make the constitution harder to change. Griffith, like other political constitutionalists, celebrates the political process, but appears ambivalent as to whether the substance of the norms that constitute those procedures would make a beneficial contribution to debate on primary legislation or enhance political accountability within Parliament.

Gee disagrees with Oliver's reading:

Griffith is not troubled by limiting government per se, but rather by limiting government through judicially imposed constraints, and even then he is troubled only by certain judicially imposed constraints.⁶⁶

According to Gee's interpretation, Griffith should be read as being in favour of a 'political model of constitutionalism',⁶⁷ one that could support the idea that parliamentary constitutional interpretation adds value to the legislative process. Gee explains:

And any model of constitutionalism must include an account of the norms creating, structuring and defining the authority of the

⁶⁶ Gee (n 42) 35.

⁶⁷ Ibid.

governing institutions, including an explanation as to how those norms *constrain* the power of those institutions. For Griffith, politics, and in particular parliamentary process, should create, structure and define the authority of the governing institutions, including imposing constraints on those institutions. That is to say politics, and to some extent law, should (and do in fact) constrain the governing institutions.⁶⁸

Two points arise from Gee's analysis of Griffith's position. The first is that while Griffith clearly would defend the role of law in setting up democratic procedures that constrain Government power, Oliver is right to point out that Griffith, and other political constitutionalists stop short of recognising that the substance of the norms should be prioritised in any way in the political process. In *Political Constitutionalism* Bellamy argues that according to the political conception of the constitution 'the democratic process is the constitution'.⁶⁹ According to Goldoni's reading this means that 'constitutions cannot be considered norms *stricto sensu*'.⁷⁰ One of the reasons that Oliver, Nicol and Rawlings appear to connect the growing role of constitutional norms within legislative debate with a move away from political constitutionalism is precisely because Griffith and other political constitutionalists are ambivalent on the role that substantive constitutional (and legal) analysis should play within political debate in Parliament. On one reading, political constitutionalism is in favour of creating an 'autonomous political sphere' within Parliament, where constitutional

⁶⁸ Ibid.

⁶⁹ Bellamy (n 26) 5.

⁷⁰ M Goldoni, 'Two internal critiques of political constitutionalism' (2012) 10 International Journal of Constitutional Law 926, 936.

norms, legal factors and the influence of courts are shut out from political debate.⁷¹

One example of the defence of the autonomy of politics is Waldron's well-known contrast between the parliamentary debate on the Medical Termination of Pregnancy Bill, and the reasoning of the US Supreme Court in *Roe v Wade*.⁷² Waldron cites the absence of legal consideration from the former as an advantage:

The key difference between the British legislative debate and the American judicial reasoning is that the latter is mostly concerned with interpretation and doctrine, while in the former decisionmakers are able to focus steadfastly on the issue of abortion itself and what it entails.⁷³

This comparison is insightful in relation to the debate on the case against the ability of the court to strike down legislation on grounds of constitutionality. Nevertheless, the comparison is arguably misrepresentative of the parliamentary legislative process because it underplays the extent to which law, interpretation and legal doctrine play an important role in the construction of Bills, and in the debate, particularly after the second reading stage. Parliamentary law-making rightly produces opportunities for the sort of moral debate that Waldron admires, but it also is informed by analysis of constitutional norms, and understanding of legal doctrine. Waldron is no doubt aware of this, but does not address the point directly. Political

⁷¹ See 1.2.

⁷² *Roe v. Wade*, 410 U.S. 113 (1973); J Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346, 1384-1386.

⁷³ *Ibid*.

constitutionalism is not clear about what benefits, if any, the substance of constitutional norms might bring to political debate on primary legislation in Parliament. As a result, political constitutionalism is not associated with a positive case for constitutional interpretation, even if it occurs within political institutions.

The second important element of Gee's analysis is that Griffith conceives of these political constraints as not just limiting Government, but also empowering it. This combination is central for the relationship between political constitutionalism and parliamentary constitutional interpretation. The practice examined in this thesis should not be understood as the political enforcement of constitutional limits, because the interpretation is used to shape, rather than simply limit, the process of enacting laws with constitutional effect.⁷⁴ This helps to explain the way the practice fits within political constitutionalism. The positive role for constitutional norms within the legislative process, defended in this thesis, is not based on the practices ability to enforce counter-majoritarian limits, but rather on enabling the majority to enact legislation in a way that, both in terms of process and substance, responds to the relevant constitutional norms. The practice does produce a limiting effect, in the sense that it demarcates what is not politically acceptable for those parliamentarians that engage in constitutional interpretation. The limiting effect is very weak in comparison to other mechanisms of constitutionalism (such as a judicial strike down power), but its presence is sufficient to create the combination of the

⁷⁴ Scott (n 14) 2173-2176.

constitution and limitation of power that is central to constitutionalism.⁷⁵ As a form of legislative politics, the practice enhances the legitimacy of the legislative process, strengthens the process of holding the Government to account for its legislative proposals and facilitates a distinctively parliamentary contribution to the constitution. Together these values represent the practical manifestation of a political form of constitutionalism within the legislative process in Parliament.

For political constitutionalism to be relevant to parliamentary constitutional interpretation, the model needs to recognise that the presence of constitutional norms, including legal norms, within debate on primary legislation in Parliament is a strength rather than a weakness. As Tushnet points out, the problem with the idea that political constitutionalism is reliant on the operation of an autonomous political sphere is that it ignores the fact that ‘political constitutionalism is instantiated in institutions established by law’.⁷⁶ Law in this sense extends beyond the legal norms that are enforced by courts, and includes constitutional norms that regulate how ‘political institutions’ operate.⁷⁷ One of the key insights from the case studies is that the substance of such norms, that regulate the relationships between the key political actors within the constitution, play a positive role in informing the analysis of the constitutional effect of legislation. As Garrett and Vermeule note ‘institutional choice and institutional design are

⁷⁵ Scott (n 14) 2175.

⁷⁶ Tushnet (n 36) 2250.

⁷⁷ Ibid.

necessary components of normative constitutional analysis'.⁷⁸ The legislative process within Parliament is properly understood as the interface between law and politics within the UK constitution. The relevance of political constitutionalism to parliamentary constitutional interpretation depends on the model's recognition that, as matter of good practice, the substance of the norms that constitute political relationships should influence debate on the content of primary legislation in Parliament. Within a political constitution, constitutional norms are not limited to simply constituting procedure, it is right that they condition the substance of political debate, because constitutionalism, even in its political form, depends upon this influence.⁷⁹

The presence of constitutional interpretation within legislative debate in Parliament has been interpreted as a departure from the political constitution, as traditionally conceived, because political constitutionalism is ambivalent on whether the substance of constitutional norms makes a positive contribution to political debate. One of the reasons for this ambivalence is that political constitutionalists make a number of powerful arguments against entrenchment. Bellamy argues against constitutionalising, in the sense of entrenching, legislative procedures because it privileges certain normative concerns over others: 'it is wrong to privilege certain forms of concerns in a procedure that should only be about being fair and impartial and weighing all views equally'.⁸⁰ He argues that separating

⁷⁸ Garrett and Vermeule (n 39) 1280.

⁷⁹ Scott (n 14) 2181.

⁸⁰ Bellamy (n 26) 178.

discussions of constitutional matters ‘fails to provide the appropriate incentives for ensuring decision-makers track the interests of those they govern’.⁸¹ As Goldoni points out, this position appears to reject the political enforcement of constitutional laws because it would violate the principle of equality and equal participation in the process of political decision-making.⁸² Walen highlights the implications of Bellamy’s form of political constitutionalism:

He objects to the very notion of legislatures checking themselves by appeal to a written constitution, for such a system would limit the legislature’s ability to carry out the agenda of a current majority.⁸³

These criticisms misread Bellamy’s argument. Bellamy is not against political engagement with constitutional norms, rather his arguments should be read as objections to removing debate on the content of the constitution from the ordinary legislative process.

Political constitutionalism is not sceptical of the value of constitutional norms.⁸⁴ Instead, political constitutionalism aims to offer an alternative account of constitutional norms, which explains their authority by locating their roots within the democratic process. Bellamy explains:

⁸¹ Bellamy (n 26) 178-179.

⁸² M Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (2013) 14 *German Law Journal* 1053, 1059-1060; M Goldoni, ‘Political constitutionalism and the value of constitution making’ (2014) 27 *Ratio Juris* 387, 387.

⁸³ A Walen, ‘Judicial review in review: a four-part defense of legal constitutionalism A review essay on Political Constitutionalism’ (2009) 7 *International Journal of Constitutional Law* 329, 330.

⁸⁴ Bellamy (n 26) 259; R Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86, 110.

Far from being sceptical of rights or law, political constitutionalists defend both. They merely regard the legislature as the most appropriate forum for seeing rights in the round and ensuring that their specification in legislation takes into account the full range of considerations necessary to promote the public interest.⁸⁵

On this reading, political constitutionalism does not have a problem with a positive role for constitutional interpretation within Parliament, and is instead only concerned that constitutional norms should not dominate the process in the way that they can when they are entrenched and subject to strong judicial review. Bellamy is in effect arguing that a substantive reading of the constitution does not weaken political constitutionalism as long as parliamentary supremacy is not replaced by constitutional supremacy.

Political constitutionalism is not associated with a positive role for constitutional interpretation, in part because it directs much of its energy towards criticising constitutional interpretation when it used to justify striking down primary legislation.⁸⁶ The case against constitutional interpretation in the context of entrenched and judicially enforced constitutional laws does not necessarily translate into opposition to the role of constitutional interpretation identified in this thesis. However, the connection relies upon political constitutionalism acknowledging that constitutional norms, especially constitutional law, play a positive role

⁸⁵ Ibid.

⁸⁶ For a classic example see: J Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346.

within a political constitution. The idea that the political character of a constitution, and the form of constitutionalism it produces, depends on political debate within Parliament being free of substantive constitutional analysis is highly problematic, not least because it is unrealistic. Instead, parliamentary constitutional interpretation should be understood as an important component of constitutionalism within a constitution whereby the content of the constitution can be renegotiated within the legislative process.

7.3 Three challenges

There are a number of additional challenges to the connection between political constitutionalism and constitutional interpretation within Parliament that should be outlined at this stage. Firstly, parliamentary supremacy and the Government's ability to disregard arguments based on constitutional analysis pose a challenge to the idea that parliamentary constitutional interpretation represents a form of constitutionalism at all. Secondly, it has been argued that it is incoherent to combine support for parliamentary supremacy with a positive case for constitutional interpretation within Parliament. Thirdly, advocating parliamentary constitutional interpretation could be interpreted as being too prescriptive for political constitutionalism.

The first challenge is to the very idea that parliamentary constitutional interpretation within the context of a political constitution represents something which can be properly regarded as a form of constitutionalism. The principal problem is that the practice of parliamentary constitutional

interpretation is fundamentally conditioned by parliamentary supremacy, in the sense that the principles subject to interpretation do not rely on any formally superior status, and are not entrenched. For Murkens, the concept of constitutionalism should not be divorced from these constitutional features that the UK constitution does not possess.⁸⁷ Murkens argues that constitutionalism should not refer to the political process of ‘self-limitation’ using constitutional norms.⁸⁸ As a consequence Murkens argues that constitutionalism is something that the United Kingdom’s constitution lacks:

The centrality of the doctrine of Parliamentary sovereignty poses a particular obstacle for constitutionalism which “implies entrenchment, whatever form that entrenchment may take.” But the cardinal principle of the United Kingdom’s constitution precludes entrenchment and is, therefore, incompatible with constitutionalism.⁸⁹

Kahana also argues the two ideas are fundamentally incompatible. He states that parliamentary supremacy is the equivalent of ‘non-constitutionalism’.⁹⁰ The fact the United Kingdom’s constitution does not have superior or ‘fundamental’ status in relation to statute law is, in this sense, incompatible with a major tenet of a number of forms of liberal constitutionalism.⁹¹ According to certain accounts of liberal constitutionalism, constitutional

⁸⁷ Murkens (n 12) 438-450.

⁸⁸ Murkens (n 12) 451-452.

⁸⁹ Murkens (n 12) 434-435.

⁹⁰ T Kahana, ‘Legalism, Anxiety and Legislative constitutionalism’ (2006)

31 *Queen’s Law Journal* 536, 563.

⁹¹ For an alternative view see: G Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56 *American Political Science Review* 853, 853-57.

government requires that the constitution contain protections, which mean that that it cannot be changed via the ordinary political process.⁹² Whereas as political constitutionalism implies that entrenchment shackles democracy, defenders of entrenchment as a fundamental part of constitutionalism argue that constitutional protection of constitutional procedures and rights is logically a part of democracy.⁹³

Two main points arise from this view of the relationship between entrenchment and constitutionalism. The first is that while opposition to certain forms of constitutional entrenchment is a defining feature of political constitutionalism, political entrenchment of constitutional norms is not necessarily incompatible with political constitutionalism. To require political constitutionalism to include certain forms of constitutional entrenchment would appear to place a limit on the range of forms of constitutionalism, which would result in an unduly narrow view of the concept.⁹⁴ The second is that whatever conception of constitutionalism is preferred, the influence of the concept within a constitutional system necessarily extends beyond the presence of certain constitutional and institutional features, and filters into the way in which primary legislation is debated within the legislature. For constitutional norms to be effective and

⁹² S Issacharoff, 'The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections' (2003) 81 University of Texas Law Review 1985; J Worley 'Deliberative Constitutionalism' [2009] Brigham Young University Law Review 431, 440-441.

⁹³ C Sunstein, *Designing Democracy* (OUP 2001) 97-105.

⁹⁴ A Tomkins, 'Of Constitutional Spectres' [1999] Public Law 525, 534-536; D Feldman, "'Which in Your Case You Have Not Got': Constitutionalism at Home and Abroad' (2011) 64 Current Legal Problems 1, 4.

to have the minimum level of relevance which any version of constitutionalism demands, they need to be able to be interpreted by political actors. In other words, all forms of constitutionalism, even those that prescribe constitutional entrenchment, rely upon the interpretation of constitutional norms taking place outside the context of formal amendment procedures or judicial review. Without it, the normative content of the constitution cannot shape debate on primary legislation and political accountability.

Political constitutionalism can be distinguished from certain forms of liberal constitutionalism by the fact that the former advocates a more fragile form of protection for constitutional norms. This chapter argues that political constitutionalism, like certain accounts of liberal constitutionalism, should advocate parliamentarians using the substance of constitutional norms in the legislative process. The problem with the idea that parliamentary supremacy is incompatible with constitutionalism is that it implies that the reality of political practice is irrelevant to the assessment of the presence and form of constitutionalism.⁹⁵ Parliamentary supremacy should not supersede evidence of practices that are associated with constitutionalism, just as constitutional entrenchment should not, in of itself, indicate that the reality of political practice fits with any form of constitutionalism. Murkens is right to warn that parliamentary supremacy is an obstacle to establishing a connection between certain form of liberal constitutionalism and the UK constitution. One of the strengths of political constitutionalism is that it does

⁹⁵ Feldman (n 94) 4.

not make this mistake, and accounts for parliamentary supremacy, and defends a weaker form of protection for constitutional norms than is afforded by systems with constitutional supremacy.

Dyzenhaus puts forward a second challenge to the connection between parliamentary constitutional interpretation and political constitutionalism. Dyzenhaus argues that it is incoherent to combine support for parliamentary supremacy and constitutional interpretation. The first part of Dyzenhaus' critique is to point out that political positivism rejects constitutional interpretation in any forum:

Political positivists do not traditionally argue for an enhanced role for legislatures in constitutional interpretation as an independent good. That is because they are altogether opposed to constitutional interpretation, by which I mean interpretation of allegedly fundamental principles of legal order. Indeed, the very idea that there are such principles, whoever is to interpret them, is anathema to political positivism.⁹⁶

This means, according to Dyzenhaus, that political positivisms' position is coherent. By contrast, what Dyzenhaus calls 'constitutional positivism' is incoherent because it opposes constitutional interpretation in the context of strong judicial review, but defends it in the legislative context. The second half of Dyzenhaus' critique is that 'constitutional positivists think that an enhanced role for legislatures is a zero sum affair – what the legislature

⁹⁶ D Dyzenhaus 'The Incoherence of Constitutional Positivism' in G Huscroft (ed), *Expounding the Constitution* (CUP 2008).

gains, the judges must give up'.⁹⁷ Dyzenhaus argues that the problem with this equation is that an enhanced role for legislatures becomes possible only as a consequence of the judicial role that political positivists traditionally dislike.⁹⁸ According to Dyzenhaus, the case for parliamentary constitutional interpretation cannot fit with the case against judicial review. Parliamentary constitutional interpretation goes hand in hand with judicial constitutional interpretation.

Dyzenhaus' critique is important because it highlights a tension within political constitutionalism. There is a certain uneasiness within political constitutionalism about the ability of parliamentary constitutional interpretation to increase the influence of courts within the legislative process. This is especially apparent when political constitutionalists engage with the role of constitutional rights within Parliament. Bellamy argues the rights-based scrutiny in Parliament is problematic to the extent that it leads to parliamentarians 'governing like judges' by privileging the view of the JCHR's legal adviser, whose advice largely consists of 'second-guessing the likely judgments of courts'.⁹⁹ This leads to the observation that 'to the extent Parliament feels constrained by legalistic reasoning over its rights deliberations, this alleged advantage of political over legal constitutionalism is diminished'.¹⁰⁰ Bellamy's point appears to be that the political character of rights scrutiny depends on parliamentarians not being constrained by the

⁹⁷ Dyzenhaus (n 96) 140.

⁹⁸ Ibid.

⁹⁹ R Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86, 100.

¹⁰⁰ Ibid.

judgments of courts. The problem with this point, that Bellamy himself concedes, is that it is difficult to see how in reality Parliament can be said to be constrained by either the role of the legal adviser or the judgments of the courts. Both the legal adviser of the JCHR and Parliament are focused on different tasks and questions to judges, and this makes it difficult to see how they can in reality be said to ‘reason like judges’. Bellamy seems concerned that the focus on norms that are regularly interpreted by judges might limit the autonomy of the political process. Bellamy, like Griffith, submits that the interpretation of constitutional rights will transform competing political claims into legal questions that are decided by judges. But if they wish to see political actors dominate debates on the meaning of constitutional rights, parliamentarians have to be able to engage in constitutional interpretation so that they can disagree effectively with courts. Bellamy admits that the reality of the role of the JCHR and the HRA in the legislative process does not support the ‘governing like judges’ argument, and that on the contrary both have promoted ‘precisely the sort of legislative deliberation about rights political constitutionalists advocate’.¹⁰¹ Despite this, Bellamy’s uneasiness demonstrates that if political constitutionalism is to advocate a positive role for parliamentary constitutional interpretation it might need to reevaluate some of its criticism of constitutional interpretation in courts.

The third and final challenge relates to the extent to which political constitutionalism can prescribe how political actors should act. Gee and Webber point out that a feature of political constitutionalism is that it does

¹⁰¹ Ibid.

not prescribe in too much detail the content or the nature of the constitution.¹⁰² In this sense political constitutionalism might not be able to support the practice of parliamentary constitutional interpretation, because it is too detailed a prescription of how the constitution should work. If the constitution should remain open to negotiation via the legislative process, then it would not make sense for political constitutionalism to prescribe, in detail, the content of the constitution or how the constitution should be interpreted. However, Gee and Webber also point out that the absence of detailed prescription does not mean that political constitutionalism is neutral as to the content of the constitution or as to how constitutional actors use it.¹⁰³ Political constitutionalism does prescribe certain features of constitutional design and certain approaches to constitutionalism, and this is what makes it a normative model. The question is whether there is space for it to prescribe that constitutional issues arising in Bills should be engaged with in a particular way, within the legislative process. This depends on how political constitutionalism's fundamental commitment to the negotiability of the constitution through the legislative process is interpreted. It would be contradictory for political constitutionalism to argue for judicially enforceable and entrenched constitutional laws that dictate the substance of primary legislation and how parliamentarians should legislate.¹⁰⁴ But if the prescription is limited in the sense that it identifies how a particular element of the political constitution should work, rather than identifying a condition

¹⁰² Gee and Webber (n 14) 286.

¹⁰³ Gee and Webber (n 14) 287.

¹⁰⁴ Gee and Webber (n 14) 290.

of substantive constitutionality, then political constitutionalism can prescribe how parliamentarians should act.

The difficulty for political constitutionalism is that it is associated with claims about limiting the scope of law and the courts within politics. At first sight this seems to leave little room for a positive role for constitutional norms within Parliament. Another related difficulty is that political constitutionalism is primarily associated with the identification of features that a constitution should not possess, entrenched constitutional laws and strong judicial review, and less clear about what it advocates. For political constitutionalism to become a stronger model that is relevant to modern constitutional practice in the UK, it needs to be able to accommodate positive arguments for the role of constitutional norms within the political process. Put differently, political constitutionalism needs to articulate a positive form of constitutionalism, which clearly outlines the advantages of political engagements with the substance of constitutional norms in both Parliament and the courts. The next section seeks to show how political constitutionalism would be strengthened by including a positive role for constitutional norms, and constitutional law, within the primary law making process in Parliament.

7.4 Constitutional politics and political constitutionalism

A positive case for parliamentary constitutional interpretation could strengthen political constitutionalism and, at the same time, enable the model to provide a framework for debates on how the role of the practice

can be enhanced. Political constitutionalism argues that the parliamentary process should be trusted with the last word on questions of constitutionality and defends the ability of political actors to uphold constitutional values. Nevertheless, there are weaknesses in political constitutionalism's account of constitutional politics, in particular its failure to put forth a positive and distinctive role for constitutional law within a political constitution. This section sets out how including the case for parliamentary constitutional interpretation can remedy those weaknesses by providing a dynamic and positive role for constitutional norms within Parliament.

To make political constitutionalism more relevant to the reality of constitutional democracies, political constitutionalism should provide an account of how questions relating to the law of the constitution should be addressed within the legislative process. Political constitutionalism is clear that mirroring the approach of courts should be avoided, but that is not sufficient to provide much of a framework for assessing the reality of parliamentary practice.¹⁰⁵ Political constitutionalism's reluctance to advocate a positive role for the interpretation of constitutional laws within Parliament can be in part attributed to the idea that the role of constitutional law is to establish procedures rather than guide the judgment of political actors within the political process. Political constitutionalism is in favour of political disagreement on the meaning of constitutional principles, so that the constitution and the political process can be reformed via ordinary politics, but at the same time is ambivalent about whether constitutional

¹⁰⁵ See 7.3.

norms should be considered a positive force within the political process. Goldoni argues that this is problematic because ‘constitutional law cannot be completely proceduralised’.¹⁰⁶

The logic of the procedural understanding of democracy is that it increases the autonomy of politics, but the problem is that for a political culture to function effectively the architecture must play some positive role in guiding the political culture and the substantive debate on legislative proposals within Parliament. This positive influence does not conflict with the idea that constitutional norms should be subject to change and to disagreement. In other words political constitutionalism, in order to be more relevant to the reality of constitutional practice needs to recognise the normativity of constitutional law and its relevance to the law-making process and to political accountability:

This conception of a constitution as either a norm or a process betrays, however, a misunderstanding of the nature of higher law and implausible reading of the workings of political institutions. The latter certainly do not operate in a vacuum, but they have to respect some already established rules if they want to produce outcomes. In fact there is a risk of giving the impression that political action can stream out of nothing. In this way constitutional law is reduced, as famously argued by John Griffith, to “what happens.” In other words, this approach may end up adopting an almost functionalist

¹⁰⁶ Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (n 1) 1075.

stance on constitutionalism and reducing its normativity to a bare minimum.¹⁰⁷

Constitutionalism in any setting, and especially in the legislative process, is not reducible to a choice between normativity and process. All constitutions will be made up of normative content, even if they operate in the context of parliamentary supremacy. One of the most positive elements of prioritising constitutional norms within a political constitution is that it can enhance the ability of parliamentarians to defend and develop the role of political institutions and processes. To return to the observation of Garrett and Vermeule political procedures are a rich source of normative constitutional analysis that is directly relevant to the process of shaping primary legislation in Parliament.¹⁰⁸ In this sense, substantive constitutional analysis within a parliamentary context can promote the very values that define political constitutionalism.

The ability of parliamentary constitutional interpretation to effectively translate the principles that underpin political procedures into substance analysis of Government Bills was shown in the case studies. In particular, the practice served to relate debate on the detail of a Bill to broader constitutional principles, often relating to the proper role of Parliament within the constitution. One of the other reasons that including a positive case for constitutional interpretation would enhance political constitutionalism is that it would reflect a more realistic appreciation of the

¹⁰⁷ M Goldoni, 'Two internal critiques of political constitutionalism' (2012)

10 *International Journal of Constitutional Law* 926, 944.

¹⁰⁸ Garrett and Vermeule (n 39) 1318.

nature of the legislative process within Parliament. The legislative process is not primarily a policy forum. After the second reading stage, disagreement and debate is focused upon the content of the Bill in question, and in this context constitutional and legal norms are relevant, with or without entrenchment or strong judicial review. Political constitutionalism's preoccupation with entrenchment appears to be a distraction from identifying a clear sense of how constitutional politics should work within Parliament. The idea that the absence of constitutional entrenchment will result in a more 'open' process is deceptive when the practical restrictions on parliamentary law-making within a constitution with parliamentary supremacy are considered. As Goldoni explains:

Political constitutionalists present this freedom in a partially deceptive way. In fact, their view can turn out to be closing, rather than opening up, politics. On one hand, political action does not take place in a vacuum, neither can it be conceived as fully unfettered. As mentioned, there is always a common world against which political action emerges. This common world is usually organised through a political regime which carries with it principles, rules and practices. This background brings also with it a certain amount of arbitrariness, with cognitive biases, permanent subalternities and given power equilibriums. For the quality of representative lawmaking is better to bear this in mind, rather than overlooking it.¹⁰⁹

In a political constitution, many constitutional norms will represent the product of earlier political compromise, sometimes negotiated within

¹⁰⁹ M Goldoni, 'Political constitutionalism and the value of constitution making' (2014) 27 Ratio Juris 387, 401.

Parliament, and it is important that the majority of the day engages with the reasons that supported the earlier law in order to consider the widest range of perspectives on the proposed change to the constitution. There are good reasons for rejecting formalised entrenchment and other mechanisms which limit the ability of the current majority to alter the constitution, but at the same time political constitutionalism should recognise that legislation with constitutional effect creates a distinct challenge for the legislative process. The interpretation of constitutional norms represents a form of reasoning that allows Parliament to respond to that challenge effectively, and at the same time reinforce the political character of the constitution.

Political constitutionalism has not yet developed a clear case for how constitutional politics should operate within a political constitution, or what role, if any, the substance of constitutional norms should play in shaping debates on the constitutional effect of primary legislation. Political constitutionalism passionately defends the value of political procedures, including the parliamentary law-making in defending the legislative process. A political model of constitutionalism should therefore recognise that political debate on questions that relate to the constitutional norms that underpin political procedures should produce distinct requirements for those very political procedures. A key problem identified by Goldoni is that political constitutionalism is unwilling to recognise that constitutional norms can be recognised as signifying a need for a distinct form of politics:

For political constitutionalists all politics is constitutional, and ordinary politics marks the beginning and the end of the spectrum of

political action, the anchoring of the superior validity of constitutional norms in the special character of constitutional politics is unacceptable.¹¹⁰

An important insight from the analysis of the case studies is that a flat constitutional structure, where there is no formal procedure for constitutional amendment, can accommodate a distinct track for the consideration of constitutional issues within the ordinary legislative process. The argument in this thesis is that what distinguishes this track is the substance of the parliamentary reasoning, which uses constitutional interpretation. In other words, constitutional issues can be treated in a way that recognises their importance that does not require legal recognition that constitutional norms are formally superior.

Parliamentary constitutional interpretation enables political constitutionalism to respond to Gardbaum's criticism that the model 'provides no adequate forum for critically scrutinising the justification for a piece of legislation to determine if it meets the minimum standard of plausibility in terms of public reasons'.¹¹¹ Political constitutionalism should entail that within Parliament legislative proposals are evaluated in the light of the constitutional norms that underpin the political process. Constitutional norms are understood differently within a political constitution, as compared to other models of constitutionalism, they do not

¹¹⁰ Goldoni, 'Two internal critiques of political constitutionalism' (n 107) 943.

¹¹¹ Gardbaum (n 6) 55.

represent criteria of legality or higher law, but they can still be recognised as a criteria for evaluating legislative proposals.¹¹²

The justification for regarding certain norms as constitutional within a political constitution is to provide a ‘site’ for debate. Constitutional norms trigger debate within Parliament by alerting to parliamentarians to clauses that are potentially renegotiating the terms of the constitution. This is the core of the case for the practice of parliamentary constitutional interpretation that currently operates within the Westminster legislative process. Parliamentary constitutional interpretation should be promoted through the institutional structure of the legislative process and the constitution, to ensure that the negotiation of the constitution includes justification based upon the impact on the relevant constitutional principles. As Feldman has recently observed, such special procedures ‘foster the growth of constitutionalism as a form of politico-legal justification for action’.¹¹³ The crucial point is that, as Feldman recognises, this can be achieved without risking the key elements of political constitutionalism.¹¹⁴ Parliamentary constitutional interpretation, in the form described above, does not necessarily secure just outcomes – but it can improve the legitimacy of the legislative process, and the process of enacting constitutional change within a political constitution. This fits with Goldoni’s account of political constitutionalism’s position on public reasoning:

¹¹² Goldoni, ‘Two internal critiques of political constitutionalism’ (n 107) 949

¹¹³ D Feldman, ‘The nature and significance of “constitutional” legislation’ (2013) 129 *Law Quarterly Review* 342, 357.

¹¹⁴ *Ibid.*

Political constitutionalists put forward a proceduralist conception of public reasoning. The function of public reasoning is not so much that of justifying political decisions, as claimed by Rawls, but rather that of providing for input legitimacy. The ambition of a proceduralist version of public reasoning is captured by the idea that it does not generate outcomes we agree with, but rather that ‘it produces outcomes that all can agree to’. The best way to obtain this kind of reasoning is to follow the republican principle of ‘hearing the other side’, a principle which establishes a difference between oppression and domination.¹¹⁵

For political constitutionalism the value of parliamentary constitutional interpretation to the political process is in part based on the direct connection between constitutional norms and the function of a Parliament in a political constitution. In a political constitution, parliamentarians are the guardians of the nature of the constitution, and as a consequence they can contribute to the legitimacy of the process of constitutional change, and the political nature of that change, by using their position to contribute to the justification of provisions with constitutional effect.

Rather than diminishing the scope of political debate, the value of constitutional interpretation to the legislative process and to political constitutionalism is that it serves to expand the basis of disagreement and political debate within the legislative process. The debate on a Government Bill is not restricted by the recognition that constitutional norms are relevant

¹¹⁵ Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (n 1) 1057-1058.

to evaluating and scrutinising its contents. Many clauses cannot be opposed or scrutinised on the basis of party politics, as there might not be any policy disagreement on the detail of the Bill. In these cases, constitutional interpretation supplies additional grounds for disagreement and debate. Constitutional interpretation can serve to break open a debate on particular clauses by linking the detail and substance of a Bill to broader constitutional principles, as in the debate on the Health and Social Care Bill.¹¹⁶ The most important contribution of parliamentary constitutional interpretation is to enable parliamentarians to hold the Government to account for the constitutional effect of its legislative proposals. The substance of Parliament's analysis of legislation is relevant to the standard of political accountability. Free and open policy debates have a role within Parliament, but an equally important component of legislative debate relies on the ability to analyse how a proposal fits within the existing constitutional and legal framework. Recognising the value of constitutional analysis in Parliament does not imply that political action needs to be contained. Instead, it is acknowledged that within the context of a legislative process whereby a legislative proposal can undermine the political processes that are central to the legitimacy of the constitutional system, the Government needs to be asked difficult questions about the constitutional effect of its Bill, and parliamentarians need to be able to interpret the norms that underpin those processes to formulate appropriate questions. Thought of in this way, the political process is strengthened by the use of constitutional norms as criteria for the evaluation of legislative proposals.

¹¹⁶ See 4.2.

Parliamentary constitutional interpretation provides a guide as to how Parliament can and should respond to the vulnerability of the constitutional settlement under a political constitution. This will address a problem within political constitutionalism. Goldoni explains that until recently ‘political constitutionalists have not taken the limited self-reflexivity of parliamentary reasoning seriously’.¹¹⁷ Political constitutionalism has failed to acknowledge the weaknesses of the parliamentary deliberation, and how such weaknesses can impact upon the political constitution. Waldron’s recent evidence to the JCHR on the issue of prisoner voting, also explores this weakness:

The position that I defend, the misgivings I have about judicial review and the democratic basis that I embrace as a foundation of that position run into their deepest challenge when the majoritarian institution is actually addressing the basis its own electoral credentials. It runs into the deepest challenge where the parliament is actually addressing the right to vote and the integrity and continuance of the electoral and democratic process. . . Parliament’s legitimacy and supremacy in our constitution is not based upon history and is not an abstract proposition; it is based on the fact that . . . Parliament has electoral credibility. Parliamentary decision-

¹¹⁷ Goldoni, ‘Constitutional reasoning according to political constitutionalism’ (n 1) 1070.

making and legislation is legitimate because people have the right to vote, not the other way round. Parliament is a guardian of that.¹¹⁸

Goldoni makes a similar point:

The most serious challenge for the parliamentary style of lawmaking is that the legitimacy of this principle (parliamentary sovereignty) is contingent upon the integrity of the electoral and democratic process.¹¹⁹

Political constitutionalists do not advocate parliamentary sovereignty being used as a justification for the weakening of the democratic process.¹²⁰ However, it would not be coherent for political constitutionalism to tackle this vulnerability via entrenchment or constitutional supremacy.¹²¹ Instead the answer is to bolster the ability of political institutions to engage with the normative foundations of the constitution. The legitimacy of the legislative process is enhanced when it takes changes to the constitution seriously, and it is in the long-term interests of the political constitution that the legislative process should enact legislation as legitimately as possible. If the vulnerability of the constitution is taken seriously then this will strengthen the case for leaving it open to negotiation via the ordinary legislative process.

¹¹⁸ J Waldron, JCHR, Oral Evidence, Minutes of Evidence Taken, March 15 2011, response to Q53.

¹¹⁹ Goldoni, 'Constitutional reasoning according to political constitutionalism' (n 1) 1069.

¹²⁰ J Hiebert, 'The Human Rights Act: ambiguity about parliamentary sovereignty' (2013) 14 German Law Journal 2254, 2270-2273.

¹²¹ Gee and Webber (n 14) 290.

One of the ways that parliamentary constitutional interpretation benefits from the fragility of the protection of constitutional norms within a political constitution is that it enables parliamentarians to shape constitutional meaning in response to constitutional change. In a more rigid constitutional settlement, whereby the meaning of the constitution was dominated by the courts and was less susceptible to amendment, parliamentarians would have less scope to contribute to the meaning of the constitution. The case studies showed that through constitutional protection clauses and committee reports, parliamentarians are able to set out new interpretations of constitutional principles that means that the content of constitutional norms keeps pace with the Government's priorities. The negotiability of the constitution provides a space for constitutional analysis, which is now beginning to be used systematically. In practice the political influence of these contributions to the meaning of the constitution is at the mercy of the majority, however, this does not mean that they are necessarily ignored.

Political constitutionalism is, at its core, the case for a fragile constitutional settlement. The problem is that within a political constitution, this fragility does not necessarily translate into the open debate on the constitutional settlement that political constitutionalism advocates. If the role and meaning of constitutional norms is not appreciated within the political culture, then they are unlikely to be subject to debate, even if they are relevant to proposed changes to the law. Such a failure is problematic for political constitutionalism as it relies on the quality of the parliamentary process to maintain the case for the weak protection of the norms that underpin the

political process. As a consequence, political constitutionalism needs to create a more positive role for constitutional norms in guiding debate on primary legislation in Parliament. The result is a more balanced model of constitutionalism that is in a better position to inform how Parliament can play an enhanced role in constitutional debate.

Conclusion

Constitutional interpretation should play a part in the legislative process in all constitutional democracies, but the expectations of its role in the UK constitution are unclear and uncertain, in part because it might be assumed that the absence of an entrenched constitution and the presence of parliamentary supremacy would limit the practice's relevance to primary law-making in Parliament. The very conditions that underpin political constitutionalism would seem to determine the marginal relevance of the practice. However, having identified that its role is more than marginal in the case studies, this chapter has sought to demonstrate that political constitutionalism offers the most promising normative foundations for the practice. To do this, political constitutionalism needs to innovate and develop a clearer sense of the way in which constitutional politics should occur within Parliament. Political constitutionalism need not fear the substantive influence of constitutional norms upon primary legislation within the context of the majoritarian decision-making process within Parliament. Even if a constitution places the primacy of the parliamentary legislative process at the apex of the system, it enhances the credibility of that particular model to recognise that the norms that constitute the system

can play a positive political role, both in terms of holding the Government to account and in terms of making a difference to the scrutiny and content of legislation. The sort of political action that defines Feldman and Hunt's conception of constitutionalism, referred to in Chapter 6, can form part of the political model.

Political constitutionalism' demand that a constitution is open to change through the legislative process need not prevent 'the influence of previous constitutional settings' from having any influence on how laws are made'.¹²² For political constitutionalism to be effective, it needs parliamentarians to be proactive in their approach to developing the meaning of constitutional norms in the legislative context. There are signs that in the UK, parliamentarians are beginning to take this task seriously. The real difficulty is whether this will have a significant impact upon the Government. The political nature of the constitution may not require the substance of primary legislation to conform to the conditions of constitutionality, but if the Government cannot be prompted to justify the constitutional effect of its legislation within Parliament, then the political form of constitutionalism is not operating as it should.

The nature of the constitution, and the institutions and the procedures that it creates, are central to the form of constitutionalism that operates within any constitutional context. It makes sense to maintain a clear divide between those constitutions that keep the substance of the constitution within the

¹²² Goldoni, 'Political constitutionalism and the value of constitution making' (n 109) 397.

grasp of the standard legislative procedure and those that create significantly higher legal hurdles, via entrenchment or strong judicial review. Parliamentary constitutional interpretation shows that within the former, there is much that can be done to recognise the distinct needs of legislative proposals with constitutional effect that does not endanger the negotiability of the constitution, on the contrary it strengthens both the process and substance of negotiating the constitution within Parliament. The next question is what more can be done to improve the constitutional and institutional conditions that sustain constitutional interpretation within Parliament? How can they be improved without sacrificing the features that secure the political character of the practice? These are the questions addressed in the concluding chapter.

8. Conclusion

Parliamentary constitutional interpretation has the potential to expand Parliament's constitutional role. Within the existing framework, parliamentary constitutional interpretation raises the level of justification within the parliamentary legislative process and facilitates a distinctive parliamentary contribution to the normative content of the constitution. The practice serves to strengthen the negotiability of the constitution and broaden the scope of political debate, contributions which fit within the tenets of political constitutionalism. The current position of the practice in Parliament is underpinned by two institutional features: the effectiveness of parliamentary scrutiny in the House of Lords, which is a result of its current composition; and the presence of parliamentary committees dedicated to the task, particularly the Constitution Committee. At the same time, the detailed examination of the practice has revealed a number of factors within the process that appear to limit its potential influence. This concluding chapter has two aims. First, it shows how the value of constitutional interpretation can be used to judge parliamentary performance. Second, it sets out a number of options that could strengthen the role of constitutional interpretation within Parliament, without departing from the conditions that are vital to the political form of constitutionalism.

Political constitutionalism makes the case against constitutional laws or institutional arrangements that might result in a substantive limit on the scope of political debate and the substance of primary legislation. Political

constitutionalism argues that democratic procedures, and particularly the legislative process, should not be subject to substantive limits. This argument against both strong judicial review and certain forms of entrenchment, and for a constitution that can be renegotiated via the legislative process, can be read as a defence of the United Kingdom's existing constitutional arrangements. However, political constitutionalism does not provide a developed account of how the norms of the constitution should influence the legislative process, and this thesis has shown that constitutional interpretation does play an important role within Parliament. For a political constitution to function effectively, a whole range of constitutional norms, including those that constitute procedure, will guide the content of primary legislation. This does not mean that constitutional norms have to serve as limits on the legislative capacity of Parliament, but it does mean that constitutional interpretation should inform the process of negotiating the content of primary legislation within Parliament. By advocating a positive role for constitutional interpretation within Parliament, political constitutionalism can be used to judge parliamentary performance and to guide parliamentary reform.

8.1 Evaluating parliamentary performance

The potential contribution of constitutional interpretation within Parliament provides some basic criteria for evaluating how Parliament enacts Bills with constitutional effect. While many are rightly cynical about Parliament's limited power over the Government, such concerns should not limit our expectations of what parliamentarians should do with the tools available to

them. Advocates of parliamentary reform bemoan the elements of the process that hamper parliamentary scrutiny, such as the absence of pre-legislative scrutiny and the Government's control of the timetable in the Commons. These concerns create quite clear prescriptions for how an ideal legislative process should work, and parliamentarians use these prescriptions to criticise the Government when these procedural expectations are not met. The preceding chapters have sought to show how a particular form of reasoning, constitutional interpretation, can be used to set certain expectations of the substance of parliamentary deliberation.

In terms of raising the level of justification, three basic points can be used to evaluate Parliament's substantive analysis of the constitutional effect of a Bill. Firstly, parliamentarians should use constitutional interpretation to challenge the Government's justification for the constitutional effect of a Bill. If the Government does not put forward a justification at the outset of the parliamentary process, then parliamentarians and parliamentarians should put forward analysis of the constitutional effect of a Bill at the earliest opportunity. Secondly, the interpretation of the constitutional effect of a Bill should be supported by constitutive reasons that make reference to the existing constitutional framework. In other words, parliamentarians should explain the basis of their position on the constitutional effect of a Bill by identifying the relevant constitutional norms. Thirdly, parliamentarians should use amendments to frame the substance of their analysis of the constitutional effect of the Bill. This is critical to prompting the Government to developing its case for the constitutional effect of a Bill.

If it can be shown that a constitutional issue can be resolved via a workable amendment, then this makes it more likely to prompt justification from the Government and a potential concession.

In terms of evaluating Parliament's contribution to the substantive content of the constitution, three qualities are particularly relevant. Firstly, parliamentarians, and particularly parliamentary committee should be bold in their approach to analysing the constitutional effect of a Bill. They must not be afraid to address the 'merits' of a Bill. Parliamentarians and committees should develop innovative interpretations of established principles, or even establish new constitutional standards that can inform legislative scrutiny. Secondly, parliamentarians should use their understanding of the norms that underpin Parliament's role in the constitution to develop their constitutional analysis. Parliamentary procedures, and the relationship between Government and Parliament are both regulated by a rich store of constitutional norms that Parliament bears the primary responsibility for interpreting and applying to primary legislation. Thirdly, parliamentarians should use the judgments of their predecessors, in various forms, to inform their analysis of a Bill. The case studies showed that committee reports, constitutional protection clauses and *Hansard* are all valuable sources for constitutional interpretation of the constitutional effect of a Bill.

A proactive approach to developing the meaning of the constitutional norms in the legislative context serves to improve the strength of the practice in

relation to justifying the constitutional effect of a Bill. The quality and the depth of the parliamentary reasoning on significant constitutional questions, for example on the boundary between primary and secondary legislation or on the appropriate use of sunset clauses, makes a difference to parliamentarians' ability to analyse such issues when they arise in debate. When a Bill is introduced at short notice which raises significant constitutional questions, parliamentarians can draw upon their previous analysis to enhance their scrutiny. In turn, a strong body of existing constitutional interpretation increases the ability of parliamentarians to influence the content of Government Bills. Clear positions on constitutional norms gives advance warning to Government, and also helps to build influence within parliamentary debate. For these reasons, the presence of both of these elements of constitutional interpretation is central to Parliament's ability to contribute effectively to the negotiation of the content of the constitution via the legislative process.

8.2 Reform and justification

In each of the case studies, the Government produced little by way of justification for the constitutional effect of the Bill when it was introduced to Parliament. None of the Bills covered, despite their significance, were subject to pre-legislative scrutiny. The explanatory notes to each of the Bills revealed little about the reasoning behind the substantive effect of the most constitutionally significant clauses. The speeches of Government Ministers at second reading went beyond the neutral language of explanatory notes, but often without any detailed analysis. The collective effect of this was that

by the time of the committee stage in the House where the Bill was first introduced, the parliamentarians engaged in detailed scrutiny did not have access to the Government's reasoning behind the constitutional effect of the Bill. If an issue with constitutional effect was identified at the committee stage, then often there was little time to discuss or to debate an appropriate solution, which also limited the level of justification of the final version of the Bill. The general point is that identifying the constitutional issues and the Government's reasoning to support the constitutional effect of a Bill at an early stage is critical to raising the level of justification within the debate.

Each of the case studies contained examples of parliamentary constitutional interpretation being used as the basis for scrutiny which then prompted the Government to develop its reasoning for the constitutional effect of a Bill. In terms of justification, this prompting is key. There can be little doubt that without prompting the Government would not have directly addressed, for example, the implications of the Henry VIII powers in the Public Bodies Bill. One of the main ways in which the contribution of constitutional interpretation could be enhanced, is if the Government used constitutional interpretation itself to set out clearly the reasoning behind the constitutional effect within the Bill when the Bill is introduced to Parliament. In the human rights context, the JCHR has managed to persuade a number of Government departments to produce detailed human rights memorandums that set out the Government's legal analysis of human rights issues relevant

to the Bill.¹ Government disclosure of this advice can facilitate a ‘culture of justification’ within Parliament. In this context, human rights benefit from the fact that they are codified and that there is a body of case law to inform their application to legislative proposals. There is also no equivalent to section 19 of the HRA 1998 for constitutional norms other than the relevant rights in the European Convention of Human Rights. However, these differences are not insurmountable.

The comparison with s 19 formed part of the Constitution Committee’s analysis to support its recommendation for written ministerial statements on whether a Bill contains significant constitutional change, which would accompany the introduction of a Bill.² If the Minister considered that a Bill contained significant change, the statement would address the following points:

- what is the impact of the proposals upon the existing constitutional arrangements;
- whether and, if so, how the government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;
- in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;
- whether a green paper was published, what consultation took place on the proposals, including with the devolved institutions, and the

¹ House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (HL 2010-12 177) para 70.

² Ibid.

extent to which the government agree or disagree with the responses given;

- whether a white paper was published and whether pre-legislative scrutiny was undertaken and the extent to which the government agree or disagree with the outcome of that process;
- what is the justification for any referendum held, or to be held, on the proposals; and
- when and how the legislation, if passed, will be subject to post-legislative scrutiny.³

The committee's report is concerned with improving the process of constitutional change, and many of the points are clearly designed to address the scenario of a major constitutional reform Bill that is rushed through Parliament with little oversight. The steps recommended, such as pre-legislative scrutiny, would clearly enhance the opportunity for constitutional interpretation. But the most significant bullet point for the practice examined in this thesis is the first. In order to achieve a standard of justificatory accountability, the Government must put its case for the constitutional effect within the clauses of the Bill. At present this is often extracted from the Government gradually, and all too often late in the process. By formalising a requirement that the Government set out how the Bill would affect the existing constitutional arrangements, this would enable parliamentarians and parliamentary committees to use the Government's constitutional interpretation to build their own analysis. The interpretability of the constitutional effect of a Bill depends upon the available authoritative

³ House of Lords Select Committee on the Constitution (n 1) para 126.

analysis. Parliamentary constitutional interpretation, like most legislative scrutiny, thrives on information on the Government's position. The adversarial nature of parliamentary scrutiny is at its least effective when the Government withholds its analysis on the detail of a Bill. Hunt says that the quality of the information provided by the Government is the 'single most important factor' in determining effectiveness of the scrutiny of the JCHR.⁴

In response to this proposal, the Government argued that much of this information, including on the impact on existing arrangements, is already included in the explanatory notes.⁵ One of the most significant points in the Government's response was its negative reaction to the idea that the ministerial statement would refer to the detail of 'internal government deliberations'.⁶ The Government added:

A Bill when it is published is the collectively agreed view of the whole Government on how it wishes to proceed. The process by which it has arrived at that view is a matter for the Government, not for Parliament.⁷

This appears to refer both to the nature of the process within Government, and also the substance of the reasoning that arrived at the decision. This attitude is emblematic of an approach that limits the level of justification which parliamentary constitutional interpretation can achieve. This

⁴ M Hunt, 'The Joint Committee on Human Rights' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law* (Hart 2013) 229.

⁵ The Cabinet Office, *The Government Response to the House of Lords Constitution Committee Report 'The Process of Constitutional Change'* (Cm 8181 2011) para 10.

⁶ The Cabinet Office (n 5) para 13.

⁷ Ibid.

defensiveness and lack of openness within the democratic law-making process is highly problematic. On this evidence, any idea that coalition government would lead to a shift from majoritarian to a consensual approach within the legislative process was misplaced. One can appreciate that the Government may not want to reveal weaknesses or divisions to its political opponents. However, on questions relating to the constitutional effect of legislation, it seems strange to approach the Constitution Committee's proposal in this way. When contrasted with alternative arrangements for formal constitutional change in other constitutional democracies, the Constitution Committee's proposal is very modest.⁸ That is not to say that it would not represent a major improvement, but the strength of the disapproval from the Office of the Deputy Prime Minister seems disproportionate when placed in comparative context. For example, as part of the ordinary legislative process the Swedish Government routinely receives independent legal advice on the constitutional effect of legislation in public from the Law Council.⁹

The Political and Constitutional Reform Committee (PCRC) in the House of Commons has also recently put forward a proposal designed to improve the level of information provided by Government to Parliament for the purpose of legislative scrutiny in its report 'ensuring standards in the quality of

⁸ See for example: T Bull and I Cameron, 'Legislative Review for Human Rights Compatibility: A View From Sweden' in M Hunt, H Hooper and P Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart 2014).

⁹ Ibid.

legislation'.¹⁰ The report notes that Parliament is often deprived of the information that it needs in order to scrutinise legislation.¹¹ Part of the problem is that the explanatory notes, which are the main source of Government analysis of the legal effect of the detail of the Bill made available to Parliament, are of variable quality, and often add little to the understanding of the legal reasoning behind each clause.¹² For this reason, the PCRC recommends that a code of legislative standards should be used to frame the explanatory notes and to ensure that they contain more of the information that is relevant to legislative scrutiny. The PCRC argued that the code would be particularly beneficial for constitutional legislation:

Application of our draft Code of Legislative Standards would assist identification of constitutional legislation by ensuring the provision of relevant information. Thus, our Code would allow Parliament to determine whether it agrees with the Government's decision that a particular bill, or part of it, is or is not constitutional.¹³

The code contains a total of 37 standards, each of which demands the Government for specific information on the Bill. For example standard (k) asks for three or four lines on the policy objective on the Bill. If answered in good faith the responses to these standards would significantly increase the value of explanatory notes for legislative scrutiny in general, but would be particularly helpful for constitutional interpretation, which relies on detailed

¹⁰ Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation* (HC 2013-14 85).

¹¹ Political and Constitutional Reform Committee (n 10) para 30.

¹² Political and Constitutional Reform Committee (n 10) para 70.

¹³ Political and Constitutional Reform Committee (n 10) para 147.

knowledge of the legal effect of the Bill. Five of the standards in the PRC's code would be particularly relevant for constitutional interpretation:

(c) Does the bill in whole or in part affect a principal part of the constitution, and does it raise an important issue of constitutional principle?

(y) A list of "marker clauses", and a short explanation;

(z) A list of clauses with retrospective application;

(aa) A list of proposed areas for secondary legislation, with a note as to the relevant clauses;

(bb) A list of Henry VIII powers.¹⁴

Standard (c) is the standard used by the Constitution Committee to judge whether a constitutional issue raised by a Bill is worthy of a report. This standard, and the others which relate directly to important constitutional principles, would mean that Parliamentarians of both Houses are presented with the information necessary to engage in constitutional interpretation at the very outset. The level of justification improves when there are competing accounts of the constitutional effect of a Bill. By ensuring that the Government's position is developed at an early stage, this would make a proper contest between competing interpretive accounts of the Bill more likely to develop. This information would be particularly beneficial to the House of Commons, which lacks both the legislative scrutiny committees and the level of legal expertise that help the Lords to identify and debate constitutional issues within Government legislation.

¹⁴ Political and Constitutional Reform Committee (n 10) Annex A.

Both of these proposals could enhance the contribution of parliamentary constitutional interpretation to the level of justification within the legislative process. One of the problems that they are both seeking to address is the limited contribution of explanatory notes published alongside a Bill. One of the reasons that explanatory notes make such a limited contribution is that the Public Bill Office within Parliament, rather than Government, is responsible for their publication.¹⁵ As they are a parliamentary publication, there are restrictions upon the extent to which the notes can contain reasoning that attempts to justify the relevant clauses.¹⁶ The resulting notes illustrate the challenge of explaining the purpose of legislation in ‘politically neutral terms’.¹⁷ Hunt points out that this is problematic for human rights scrutiny.¹⁸ Proportionality analysis, which is central to the rights protected by the HRA 1998, requires precisely the sort of justificatory language that is not permitted by the rule on political neutrality. While a plain language explanation of a Bill is important, if the Government published explanatory notes directly, they could contain more information and justification for the detail in the Bill, and for any constitutional effect that the Bill might have.

Legislative drafting in the UK is known and admired for its precision and clarity.¹⁹ That being said, some elements of the current approach seem to hinder legislative scrutiny and parliamentary constitutional interpretation. In particular, the absence of a culture of *travaux préparatoires* appears to

¹⁵ D Greenberg, *Laying Down the Law* (Sweet & Maxwell 2011) 227-234.

¹⁶ Ibid.

¹⁷ Select Committee on the Modernisation of the House of Commons, *The Legislative Process* (1997-98 HC 190) para 34.

¹⁸ Hunt (n 4) 230.

¹⁹ Greenberg (n 2) 35-44.

hinder parliamentarians' access to the reasoning that lies behind legislative detail. The absence of purpose clauses also contributes to this relative paucity of published official Government legal reasoning that accompanies Bills.²⁰ Clear statements on the policy objectives behind a Bill are central to constitutional issues being identified and resolved within Parliament. In the case studies, a number of constitutional issues were resolved in part because it could be shown that they did not affect the immediate policy objectives behind the Bill.

Another way that parliamentary constitutional interpretation's contribution to the level of the justification could be enhanced is through changes to legislative scrutiny in the House of Commons. There have been many proposals put forward to reform Public Bill Committees, which is a reflection of the fact that they are recognised to be the weak point in the process.²¹ A number of these proposals, for example introducing permanent subject specialist committees would increase the Commons' capacity to use constitutional interpretation effectively.²² There is a simple change that could be made, without major institutional reform, which could make a major difference to the ability of the Commons to engage in constitutional interpretation. The Commons Committee that covers the relevant department responsible for a Bill with constitutional effect could produce a report, as the PCRC did in the case study of the Fixed-term Parliaments Act

²⁰ Political and Constitutional Reform Committee (n 10) 68.

²¹ See Meg Russell, Bob Morris, Phil Larkin 'Fitting the Bill: Bringing Commons Legislation Committees in Line with Best Practice' (UCL Constitution Unit 2013) 9-18.

²² Ibid.

2011. In that case, the report of the PCRC made a major contribution to the analysis of the constitutional effect of the Bill.²³ While it is sometimes said that Commons select committees should focus on their core tasks, the PCRC report showed that in a relatively short period it could receive expert evidence and produce a high quality report that made a significant contribution to the debate on a constitutionally significant Bill.

A final institutional reform that could enhance parliamentary constitutional interpretation would be to increase the level of legal expertise available within Parliament to support parliamentarians in their scrutiny of legislation. All three of the main legislative scrutiny committees that deal with constitutional issues within primary legislation, the Constitution Committee, the JCHR and the DPRRC, benefit from the presence of legal advisers. Further, in each of the case studies it was noted that parliamentarians with legal expertise were able to translate their interpretation of constitutional norms into amendments. Such practices are by no means the preserve of lawyers, but as legislative scrutiny is a part-time activity for most parliamentarians it is only logical to recognise that many would benefit from more parliamentary legal support.²⁴ The Labour Party in the Lords has recently used ‘Cranborne money’ to develop a specialist legislative support

²³ Political and Constitutional Reform Committee, *The Fixed-term Parliaments Bill* (HC 2010-12 436).

²⁴ D Feldman, ‘Parliamentary scrutiny of legislation and human rights’ [2002] Public Law 323, 327.

team, which serves to facilitate legislative analysis and the drafting of amendments.²⁵

8.3 Reform and negotiating the constitution within Parliament

This section considers the role that a code of soft-law standards could play in improving parliamentarians' ability to contribute to the negotiation and specification of constitutional norms.

The PCRC's aforementioned report calls for the creation of a Legislative Standards Committee that would review and amend the content of the code of standards described above.²⁶ This would facilitate Parliament's ability to develop constitutional standards. For example, it could add additional standards relating to other constitutional norms. However, the standards in the PCRC's code are all informational; the PCRC deliberately avoids substantive normative standards. The PCRC explains the reasons behind the decision to avoid obligatory language and substantive standards in the following terms: that 'an objective set of quality standards' is necessary 'to compare and judge bills and Acts', but it is important that the standards within the code are 'politically neutral'.²⁷ The Committee adds that the normative standards should 'require policy to be explained by reference to the contents of the Bill, without questioning the substance of the policy'.²⁸ On one level, the PCRC's approach can be interpreted as emphasis on the

²⁵ M Jack and TE May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 74.

²⁶ Political and Constitutional Reform Committee (n 10).

²⁷ Political and Constitutional Reform Committee (n 10) para 55-58.

²⁸ *Ibid.*

party-political neutrality of such standards, and in that sense it is understandable to seek to avoid political controversy for the purpose of providing information in explanatory notes. However, this approach limits the potential contribution of parliamentarians to specify constitutional standards via a soft law code of standards. While this code would be a major contribution, particularly in terms of prompting the Government to provide more insight into its reasoning behind the constitutional effect of a Bill, it could be argued that the proposal is not ambitious enough.

The focus on avoiding implications for the substance and policy of a Bill limits the potential of a soft code of constitutional standards. For example, if the Government introduces a Bill that grants a Minister an unfettered statutory power to abolish by order, with little parliamentary oversight, a public body established by primary legislation, where does the contents of the Bill end and the policy start? The legislative means are part of the policy. In other circumstances it may be possible to separate the two, but the fact that it is not a reliable distinction means that it should not provide the basis for the design of a code of standards. This anxiety to be seen to be politically neutral and to avoid commenting on the merits of legislative proposals is unwarranted because it dilutes the message communicated by the standards. One of the basic rationales of soft law legislative scrutiny standards is to create a set of normative principles that can be used by parliamentarians to engage in legislative scrutiny. A code should communicate to parliamentarians what the authors believe to be the principles that should be followed by Government within the legislative

process. In turn this should create an expectation that if a Government wishes to depart from such a principle then it should strive to justify the basis for such a departure. However, the language of justification was rejected by the PRC: ‘where proposed or existing scrutiny list criteria suggest requiring “justifications” to be provided or comment upon the “necessity” of provisions, we consider that such terms risk creating the appearance of subjectivity and have therefore altered the wording to be more neutral’.²⁹ I do not think that a desire to be ‘neutral’ offers an adequate basis for omitting these terms. This language is needed to communicate the significance of departing from the norms in question. Legislation itself is not ‘neutral’ in this sense, so why should soft-law standards be any different? There is no getting away from the fact that procedural democratic norms, however they are designed, have implications for the substance of primary legislation and Government policies, as well as how the Government conducts itself within the parliamentary law-making process. If Parliament restricts itself to ‘politically neutral’ normative standards, it is limiting its ability to codify the form of norms that are regularly specified from constitutional principles within the Constitution Committee’s reports.

In 2006, Oliver demonstrated that the work of the Constitution Committee could be used to extract a code of standards that could be used to enhance legislative scrutiny.³⁰ A recently published report by the Constitution Unit contains a code of 126 standards based on all of the committee reports

²⁹ Political and Constitutional Reform Committee (n 10) para 61.

³⁰ D Oliver, ‘Improving the Scrutiny of Bills: The Case for Standards and Checklists’ [2006] Public Law 219.

published up until the end of the 2012-2013 session.³¹ The standards are organised into five separate categories: the rule of law; delegated powers, delegated legislation and Henry VIII clauses; the separation of powers; individual rights; and parliamentary procedure. The majority of the standards relate to the substance of primary legislation, they are all framed in obligatory language. If this form of code was adopted by the Constitution Committee or another Committee, it would enhance parliament's ability to negotiate and specify the normative content of the constitution.

In the case studies it was shown that legislative scrutiny presents parliamentary committees with the opportunity to build a body of constitutional interpretation, 'legisprudence', as Oliver terms it which can serve to enhance the Committee's scrutiny work. A soft law code, such as that contained within the Constitution Unit's report, updated at regular intervals, would enhance parliamentarians' ability to shape the normative content of the constitution. A code of soft law standards would make this legisprudence more transparent and accessible for other parliamentarians. It would emphasise that the Committee specifies the meaning of constitutional norms in its scrutiny of Government Bills. A code would provide a reference point for the interpretation of the norms in the code, which would enable parliamentarians to draw connections and make comparisons in their legislative scrutiny of Government Bills. Most importantly, it would engage the Committee in an explicit process of specifying norms to inform

³¹ J Simson Caird, R Hazell and D Oliver, 'The Constitutional Standards of the House of Lords Select Committee on the Constitution' (The Constitution Unit UCL 2014).

subsequent parliamentary scrutiny. The committee could then also adopt the format used by the JCHR in its reports, and set out clearly at the beginning of each report the relevant norms within the code that are being interpreted and applied to the Bill in question.³²

Conclusion

Each of the proposals outlined above would enhance the interpretability of constitutional norms in the legislative context. Much more can be done to make the norms of the constitution more accessible to parliamentarians engaged in legislative scrutiny. One of the main findings of the case studies was that parliamentary constitutional interpretation is used as a basis for subsequent scrutiny. Constitutional interpretation that scrutinises clauses on a Bill is not simply valuable in terms of raising the standard of justification, it also serves an instrumental function of communicating the meaning of the constitutional effect of the clause. This communication can serve to inform subsequent debate on the enacted provision if it is repealed; it can also inform how parliamentarians approach the interpretation of comparable Bills, which raise similar issues of constitutional principle; and finally, if the analysis produces a constitutional protection clause, then this can serve as the normative basis of subsequent constitutional interpretation that informs parliamentary scrutiny. The key point is that if it is recognised that the political interpretability of a constitutional norm, including legislative provisions, is attributable to both its content and how that content is communicated, then parliamentary constitutional interpretation can be

³² See for example Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (2013-14, HL 121, HC 935) paras 14-20.

understood as a tool which is central to the effectiveness of constitutional norms within the political sphere. Political constitutionalism must account for this positive role for constitutional norms, which is not necessarily about constitutional norms acting as limits, but instead is part of the process of a constitution serving to inform its own renegotiation. In this form of political constitutionalism, the substantive principles behind the constitutional structure play a key part in the construction of statutory provisions.

Parliamentary constitutional interpretation is a practice that is building strength. As Parliament builds a track record of increasingly effective scrutiny, which results in the introduction of ‘constitutional protection clauses’ and other concessions that inform subsequent scrutiny, then the momentum could push the practice nearer the potential which I have sought to articulate in this thesis. But in order to continue to build this momentum, and to enhance the form of political constitutionalism within the UK constitution, more innovation is needed. Whatever major constitutional developments take place in the near future, Parliament will need to develop its capacity to interpret the normative foundations of the constitutional settlement, both in order to raise the justificatory standard in the legislative process and to contribute to the negotiation of the meaning of the constitution.

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